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THE LAW OF PERSONAL INJURIES

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AND INCIDENTALLY
DAMAGE TO PROPERTY BY RAILWAY TRAINS

*Based on the Statutes and Decisions of the Supreme Court
and of the Court of Appeals of Georgia*

Revised and Enlarged Edition

By
JOHN L. ^{Livingston} HOPKINS

IN TWO VOLUMES

VOLUME II

ATLANTA
THE HARRISON COMPANY
1912

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333. Chartered street-railways, diligence as to passengers, when relation exists and liability to servants.

In *Holly*, 61/215, the declaration alleged that the plaintiff was a passenger on one of the defendant's street-cars; that two men got to fighting thereon; that she attempted to get off the cars and in doing so was caught in the door of the car by the persons fighting and was badly hurt by being mashed and bruised; that the defend-

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ant was negligent in failing to provide any conductor to preserve order on the car, and that the driver was negligent in failing to suppress the fight or to eject the combatants, or otherwise to come to her assistance or interfere to preserve order. On demurrer it was held that street-railroad companies are carriers of passengers, and as such, are bound to extraordinary diligence, and liable for negligence of their agents and employees in and about such carriage; and when passengers are injured by riotous fighting among other passengers it is for the jury to say, under all the facts, whether the company was negligent in not providing a suitable conductor to preserve order, or whether the person in charge of the car as driver was negligent in the preservation of order thereon, and the safe carriage of the passengers to the place of destination. And Jackson, J., said: "It is true there may be a difference between railroads on which cars are propelled by steam across the country, and those street-railroads in cities; but both are carriers of passengers, and liable for slight neglect, or the absence of extraordinary diligence. And this duty to their passengers, of caring for their safe and comfortable conveyance from point to point, is the same." Cited, 76/317; 117/420; 1 G. A. 559.

A carrier of passengers, whether by street-cars drawn by horses through the streets of a city, or by cars propelled by steam from city to city, is bound to use extraordinary diligence; and where one is hurt by reason of its carriage, the presumption is always against the carrier. Findley, 76/311. Cited, 98/654; 117/420; 118/536.

Whether a common carrier, in not providing a seat for each and every passenger, has fulfilled its legal duty of extraordinary diligence toward the passenger is a question of fact for the jury; and in a case where an injury results to a passenger, or is partly caused, by failure to provide a seat, the fact that for a long period of time sufficient seats had not been provided, and the further fact that this was known to the defendant company, may be pleaded and proved as a circumstance of substantive negligence, as well as aggravation. Lyndon, 3 G. A. 534.

In Cole, 1 G. A. 33, it was held that when in a civil case the undisputed facts clearly and necessarily establish a certain legal conclusion, the court may so instruct the jury, and to do so is not a violation of the Code, § 4863 (4334), which forbids the judge "to express or intimate his opinion as to what has or has not been proved." This inhibition of the law applies to cases of conflicting evidence. In a suit by one claiming to be a passenger on the defend-

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ant's car, for injuries received by him while such passenger, resulting from the negligence of the defendant, and the undisputed facts and circumstances, and all fair and legitimate inferences therefrom, clearly establishing the legal conclusion that at the time the injuries were inflicted the relation of passenger and carrier existed, it was not error in the trial judge to so charge the jury. If, under the undisputed facts, the relation of passenger and carrier did exist at the time of the alleged injury, the only rule of care applicable to such case, imposed upon the carrier, was the duty of extraordinary diligence, and the court did not err in restricting the charge on this subject to such degree of diligence. Hill, C. J., said: "The plaintiff was injured while on the steps of the front platform of the car, and while entering said car for the purpose of becoming a passenger; the car was on the track of the defendant for the purpose of receiving passengers; and passengers were actually boarding said car. These facts were not disputed by the defendant. It is true it was contended that the car had reached the north terminus of the track, and that the conductor and motorman in charge were engaged, at the time of the alleged injury, in their respective duties of preparing the car for the return trip. There is no evidence that the car was not ready for the reception of passengers; on the contrary, the evidence conclusively shows that the car was ready for the reception of passengers, was actually receiving them at the time of the injury to the plaintiff, and that the plaintiff was one of the passengers, who, by the implied invitation of the defendant, was in the act of boarding the car for the purpose of taking passage at the time he was hurt. Do these undisputed facts show that the relation of passenger and carrier existed at the time of the alleged injury? There is some conflict in the authorities as to when the relation of carrier and passenger begins with reference to railway depots and grounds, but it can not be doubted that when a person is on the steps or platform of the car which is open for the reception of passengers, in the act of entering for the purpose of becoming a passenger, this relation exists. A person occupies the position of a railroad passenger as respects the railroad company, who, having approached the railroad for that object, undertakes, with its express or implied consent to travel in the car provided by it for the purpose." Cited, 4 G. A. 137.

A chartered street-railroad is a railroad company within the meaning of the Code §§ 2751, 2782 (2297, 2323) and therefore

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is liable to one servant for injuries inflicted by the negligence of a fellow-servant. Williams, 117/414. Cited, 120/907; 117/466.

334. Doctrine applies to the carrier's agents on its parallel lines.

In Bates, 103/333, the plaintiff alleged that he was knocked down by one of defendant's cars as he stepped from the rear platform of another of its cars, upon which he was a passenger and which had stopped for the purpose of letting him off, the car that struck him being upon a parallel track and approaching from an opposite direction. It was held that the relation of common carrier and passenger exists between a street-railroad company and a passenger until he has reached his destination, and has had a reasonable opportunity to alight safely from the car; and the carrier, during this period, is bound to extraordinary diligence, on behalf of itself and its agents, to protect the life and person of the passenger. This doctrine of extraordinary diligence is not only applicable to the agents of the carrier on the car on which the passenger is traveling, but also to its agents having control of another car, approaching on a parallel track, after the latter have discovered that the former car was about to stop for the purpose of discharging passengers, who might alight dangerously near such parallel track. Lewis, J., said: "There is some apparent conflict in the authorities as to whether the relation of common carrier and passenger exists after the passenger has alighted from the car, and before he has had opportunity of passing over and beyond a parallel track of the company's line, but certainly the relation exists while the passenger is in the act of alighting. When this injury occurred, therefore, the defendant company was under a legal obligation to use extraordinary diligence to protect the life and person of the plaintiff. We know of no rule of law that would necessarily restrict this doctrine to the agents of the company having in charge the particular car upon which the plaintiff had taken passage. The rule of the company introduced in evidence in this case required the motorman on the approaching car to be on the watch-out, and to so have his car under control as to prevent any injury, not only to foot-passengers who might be crossing the street, but the defendant's passengers who might be disembarking from the car that had stopped at the public crossing for this purpose. To the ordinary traveler upon foot, the motorman was bound to exercise only ordinary care and diligence; to the defendant's passengers, he was

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bound to use extraordinary care and diligence. Especially is this the case when the motorman knew, or had reason to believe, that passengers were about to alight from the car that had stopped, and that they might alight dangerously near the track upon which he was running." Cited, 125/518.

335. Presumption against the company when the injury is shown.

The presumption being that the plaintiff's injuries were caused by the negligence of the defendant company, and it having failed to show affirmatively that it was in all respects diligent, and no error of law having been committed, this court will not overrule the discretion of the trial judge in refusing to grant a new trial. Simmons, C. J., said: "The presumption against a railroad company where an injury is shown to have been occasioned by the running of its cars, applies as well to street-railroad companies as to others. Carson, 98/652. When the injury is shown, the presumption is against the company. Findley, 74/311. Carson, 98/654." Cited, 117/420, 464.

336. Boarding the car.

In White, 92/494, it was ruled that it is not per se negligence for a person, with something in each hand, to board or attempt to board an electric street-car while it is in the act of stopping to receive passengers, and before it has come to a full stop. Such boarding or attempt may or may not be negligence, according to circumstances. In this case the circumstances were not so decisive as to dispense with a jury. The court erred in granting a nonsuit. The plaintiff had an umbrella in one hand and a handkerchief in the other. Cited, 3 G. A. 770.

To attempt to mount a slowly moving street-car is not necessarily negligent. Powell, J., said: "If while the passenger is getting upon the car the motorman, by producing an unusual and unnecessary jerk, throws him off, a liability against the company may be predicated thereon. Also a sudden acceleration of the speed while the passenger is in the act of getting aboard may be negligent. White, 92/494; Jackson, 1 G. A. 632. In Ricks, 118/259, a recovery was denied because the sudden acceleration of the train had begun and was already dangerous when the plaintiff tried to catch a car rail which he missed. In the transaction now before us, if safe entrance into the car was reasonably practicable at the

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time the plaintiff attempted to mount, and the motorman negligently did something to render it dangerous, a liability might be predicated ; but if the attempt was fraught with danger ab initio, and the motorman did nothing to increase the danger, the plaintiff should not recover, though he succeeded in accomplishing a part of what was attempted without actually encountering injury." Keel, 3 G. A. 769.

337. Standing on the platform.

There was a short, steep curve in the defendant's street-railroad. In passing it the driver of the car put whip to the horses drawing it, so as to enable them to mount the steep curve with the loaded car, which was done so suddenly as to throw the plaintiff off the platform of the car, where he was standing. The car was full of passengers, some standing on the platform ; the plaintiff was standing there when the conductor received his fare. It was ruled that standing on the platform of a street-railroad car, in the absence of notice to the contrary, is not such negligence on the part of the plaintiff as to prevent his recovery for damages sustained by reason of the negligent conduct of the employees of the railroad company. *Renz*, 55/126. Cited, 117/420 ; 120/1008.

In an action for damages for personal injuries, a petition was not open to general demurrer, which alleged, in substance, that the plaintiff, an adult was a passenger at night on a greatly overcrowded street-car of the defendant company ; that after the conductor had called a given street at which plaintiff desired to alight, plaintiff signalled the conductor, who in turn signalled the motorman to stop the car at that street ; that plaintiff, thinking that such street had practically been reached, proceeded at once, for the purpose of promptly alighting, and in full view of the conductor, to work his way from the center of the car along the crowded aisle to the rear platform and on to the steps, both the platform and the steps being also crowded with passengers ; that by reason of his shortness of stature and the crowded condition of the aisle, platform, and steps, plaintiff was unable to see or locate just where the car was ; that, thinking that the car had stopped, relying on the call of the conductor, and being unable, on account of the crowd on the steps, to see the ground, plaintiff stepped from the platform on to the steps, when he discovered that the car was in motion, but too late to recover himself on account of the passengers on the steps ; and that being unable, on account of the number of such

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passengers, to catch hold of the bars at the sides of the steps, provided for the use of passengers in boarding and alighting from the car, plaintiff was violently thrown to the pavement and injured and damaged as set forth. *Worthington*, 131/450.

In *Myrick*, 6 G. A. 38, it was held that, whether it is negligence for a passenger to be upon the platform of a moving car must depend upon the attendant circumstances of danger, and the reason causing him to go upon the platform. So far from its being, as a matter of law, necessarily negligence for a passenger to be upon the platform of a moving car, it is ordinarily a question of fact for the jury whether his presence upon the platform is an act of negligence. The question of negligence can not be said to be one of law, unless, under the peculiar circumstances, the danger is so obviously great as that no one of ordinary prudence would, under any circumstances, subject himself thereto. *Russell, J.*, said: "We think that the question of negligence, as to a passenger upon the platform of a moving train, is as much a question of fact to be determined by the jury as any other phase of the subject which may be presented in any action for personal injuries. It is true that in reaching this conclusion we are confronted with two lines of decisions, apparently conflicting; but we think the proper rule was laid down in *Suber and Turley Cases*, *supra*. Nothing is better settled than that what does or does not constitute such negligence as will preclude a recovery is peculiarly a question for the jury. The rule more peculiarly applicable to the case now under consideration is that unless the danger is obviously great, the court can not hold, as a matter of law, that a given act constitutes such negligence as will preclude a recovery. [Citing the *Suber, Mack, Snider, Anderson, Turley and Forehand cases*.] In these cases the question related to passengers upon railway trains, but if it be true that the mere presence of a passenger upon the platform of a train, or even his attempting to alight from a moving train is not negligence per se, it would seem to be true a fortiori of a passenger on an ordinary street-car, operated upon the streets of a city, and necessarily run at a lower rate of speed than the passenger trains of railroad companies. In *Snider*, *supra*, the Supreme Court held that the rule of negligence applicable to a passenger attempting to alight from a moving train is also applicable to passengers on the platform not attempting to alight. This rule would seem to be peculiarly sound when applied to passengers upon street-cars, for the reason

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that in a case where a passenger may intend to transfer from one line to another, he may not have determined the exact point at which he will disembark from one car to take another; and it may frequently be necessary for him to go upon the platform to ascertain the point from which he can most expeditiously reach his destination."

338. Alighting from the car.

If a passenger on a street-car signaled the driver to stop for her to get off by ringing the bell or giving any other signal which the driver recognized, and if he stopped the car for her to get off, but did not stop long enough to give her a reasonable opportunity to do so, and she was thereby injured, the company was negligent. This was a question of fact for the jury, and they had the right to believe the testimony of the plaintiff in preference to that of other witnesses. *Randall*, 79/304. This case, 85/297; 86/407.

Whether a person who attended a child in boarding a street-car on a particular occasion, for the purpose of placing upon the car small packages which the child was to have in charge, had frequently before done the same thing at the same place when the same driver of the car was on duty, is admissible evidence as tending to show that the person on this particular occasion intended to get off after depositing the packages, as she had done on the previous occasions, and did not intend to remain on board so as to justify the driver in starting the car suddenly while she was engaged in getting off. It being the duty of the driver (there being no conductor) to take notice of all persons entering the car, his knowledge that the plaintiff did enter it in this instance might be inferred; and, if he knew that she had withdrawn from the car and alighted in numerous previous instances under like circumstances, it could be inferred that he knew or ought to have known that such was her intention on the occasion in question. The court erred in excluding evidence of the previous instances, and consequently in granting a nonsuit. *Houston*, 89/272.

In *Hester*, 130/454, it was held that the petition did not state a cause of action. The alleged negligence of the defendant was not the proximate cause of the plaintiff's injury. *Evans*, P. J., said: "The cars of the defendant on Montgomery street run as far as 42d street, where the trolleys were reversed, and the cars make return trips. When the trolley-pole is not in contact with the overhead

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wire, the lights in the car are extinguished. It was customary for the lights in the car to be extinguished by the removal of the trolley from the wire before and at the time passengers were alighting from the car, in order that seats in the car might be reversed and the car proceed on its return journey as soon as the trolley-pole had been reversed; and, in order that the passengers might be out of the way and clear of the car while the seats were being reversed, it was customary for passengers to alight from the car while the car was in darkness, and before the trolley was replaced on the trolley-wire. On the night of September 16, 1905, at 8:10 o'clock, the plaintiff was a passenger on the Montgomery-street car, and when the car arrived at 42d street she arose, for the purpose of alighting from the same. The conductor, before the car had come to a full stop, removed the trolley from the trolley-wire, and caused the car to be in total darkness, and, the night being dark and rainy, in alighting the plaintiff was unable to see clearly the steps of the car and the ground below, and her foot missed the lower step, and she was thrown violently upon the cobblestones of the street, and received certain described injuries. The specific negligence alleged is that the defendant 'was negligent in causing said car to be in darkness at the time she and other passengers were attempting to alight from said car, and in failing to afford your petitioner sufficient opportunity to alight in safety.' The petition admits that the car stopped at the terminus of that particular line; that it had come to a full stop before the plaintiff arose from her seat for the purpose of leaving the car. It is not charged that the place where the car stopped was an unsafe place to discharge passengers. The gravamen of the complaint is that the street-railway company was negligent in causing the car to be in darkness while she and other passengers were attempting to alight from it. The plaintiff voluntarily undertook to leave the car with a knowledge that it had stopped at the terminus of its line, that the night was dark and rainy, that the purpose of the conductor in reversing the trolley was to prepare the car for the return journey, that the lights would be only temporarily extinguished during the process of reversing the trolley-pole, and would immediately reappear when the trolley-pole was replaced to the trolley-wire. The negligence of the company in extinguishing the lights preceded the act of the passenger in seeking to disembark, and, with a knowledge of the company's negligence, she elected to leave the car before the lights were restored by the re-

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placing of the trolley-pole on the trolley-wire. With a clear chance and full opportunity to escape the consequences of the company's negligence by remaining at her seat until the car was again lighted, it can not be said that the company's negligence was the proximate cause of the plaintiff's injury." Citing *Simmons and Hill cases, supra*.

A woman having full knowledge that a street-railway company had torn up a strip of pavement running along its track in a city street and extending on each side of her residence for more than a block, for the purpose of laying an additional track, and of the consequent depression or hole in the pavement two or three feet wide, caused the conductor of a car on which she was riding to stop it in front of her home, in the middle of a block, at a place where cars would stop for passengers; and in the daytime, in full view of the situation, and without any compulsion, urging, or emergency, she voluntarily attempted to step from the car across such opening to the pavement on the other side of it, and in doing so stepped on a paving stone or dirt, which gave way and she fell and was injured. Held, that she showed no right to recover against the company, and a nonsuit was proper. *Johns, 133/525.*

339. Injured by a jerk in alighting.

In *Walters, 95/519*, it appeared from the evidence of the plaintiff, who was a passenger upon an open electric car, that he signaled the conductor to stop, that the speed of the car was greatly reduced, that while it was yet in motion the plaintiff stepped out upon the running-board, picked up his sample-case with his right hand, turned his body a little outward from the car, let loose the upright support with his left hand, and was just in the act of stepping off, when the conductor signaled the motorman to go forward, who obeyed, and the car gave a sudden and violent jerk, by reason of which the plaintiff was thrown to the ground and injured. Under these facts it was error to grant a nonsuit, as the jury might have found that the plaintiff was not guilty of such negligence as would bar all right of recovery. But for the signal to go forward, and the jerk, the judgment of nonsuit would have been affirmed. Cited, *120/226.*

In *Mullikin, 126/722*, Mullikin brought his action to recover for a personal injury, alleging, that at the time of the injury he was a

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passenger on a car of defendant company; that while seated on said car, the overhead trolley-wire parted, causing flashes of electricity to play around the car and to frighten the passengers thereon: that the motorman in charge of said car cried out for all persons to leave the car, and thereupon plaintiff proceeded to the side of said car for the purpose of alighting, but just as he stepped upon the running-board or step, the car came to a sudden and violent stop, and he was thrown forward into the street, thereby sustaining various bodily injuries. Defendant denied the material allegations of the petition, and alleged that plaintiff's injuries were caused by his own negligence, and were not due to any negligence on the part of defendant. It was held that whether the injuries to the plaintiff were the result of his own negligence and failure to exercise due care and caution, or whether they were caused by alleged acts of negligence of the defendant company's servants, being a material subject of inquiry in the trial of the case, and there being a conflict in the testimony upon this issue, it was not error for the court to give the following charge to the jury: "If the plaintiff was a passenger upon a car of the defendant company, and you find that the plaintiff was then and there exercising ordinary care for his own safety, and that while so exercising such care [he] was preparing to alight from the car, and you find that such preparation to alight, under all the circumstances and in the manner shown by the evidence, was not negligence or carelessness on the part of the defendant [plaintiff], and you further find that the motorman suddenly stopped the car in such a manner that it then and there threw the plaintiff to the ground, and that such stopping of the car was negligence on the part of the motorman, and the plaintiff was thereby injured as charged in his petition, and that the plaintiff was during all the time in the exercise of ordinary care and caution for his own safety, the defendant would be liable to the plaintiff."

In *Lyle*, 4 G. A. 113, it was held that in a suit to recover damages against a street-car company, where the allegation of negligence is the negligent movement of a car of the defendant, causing a sudden, violent, and unusual jerk, which threw the plaintiff across the seat of the car, it was erroneous to give in charge to the jury the following instruction: "If, in reviewing the testimony, you are satisfied that the plaintiff was injured by a sudden, violent, and unusual jerk, and that he could not, by the exercise of ordinary care and diligence, have protected himself against the consequences of this negligent

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act, then he would be entitled to recover." The error in this instruction is twofold: First, that a recovery could be predicated on proof of a sudden, violent, and unusual jerk. To make a jerk an act of culpable negligence it must have been unnecessary at the time and place where it occurred, as well as violent and unusual. Second, that the charge contained an assumption by the judge and an instruction to the jury that the act mentioned constituted negligence; and that "this negligent act" had been proved. Hill, C. J., said: "The rule applicable is the same as that applied to noises caused by the running of trains. Liability arises from the injuries so caused only when the noises are both unusual and unnecessary. 2 G. A. 162 (58 S. E. 374); Morgan, 77/788. It has been held, that in determining whether an irregular motion of a train or car was unusual and unnecessary, not only the character of the train or car, but also the place where such motion occurred, should be taken into consideration,—for instance, that a motion which might be considered violent and unusual on a straight track might be both usual and necessary in going around a curve, or in going from a main track to a switch track, or in passing over tracks. *Ball v. Mabry*, *supra*; *Ayers v. Rochester Ry. Co.*, 156 N. Y. 104 (50 N. E. 960); *Moser v. Street Ry. Co. (Ky.)*, 74 S. W. 1090, 1 St. Ry. Rep. 240. In a case decided by the Massachusetts Supreme Court, it was held that a passenger on a street-car, who was injured by being thrown to the ground by a lurch of the car in passing over the main track to a switch track, could not recover therefor, where there was no evidence that the injury was due to a defect in the car or track, or that the speed was unusual or dangerous. Such motions of street-cars are of quite frequent occurrence, and are to be expected to a greater or less degree whenever the car passes from one track to another, and are of the class of usual and unavoidable incidents in the use of cars upon the streets. *Bryon v. Lynn & Boston R. Co.*, 177 Mass. 303 (58 N. E. 1015); *Ilges v. St. Louis Trans. Co.*, 102 Mo. App. 529 (77 S. W. 93, 2 St. Ry. Rep. 586)." Cited, 5 G. A. 139. Plaintiff testified that he had ridden on defendant's cars six or seven times daily for several years; that he knew their usual motions and movements; that the jerk which it was claimed caused his injury "was an unusual jerk in that it was very severe. It was a sudden jerk. Witness means by severe jerk that it jerked him with such force that when he caught hold of the railing on the rear end of the car, it jerked his hold loose. It was with such force that

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witness could not hold on to the bar." Held, that permitting the witness to testify that it "was an unusual jerk" was not cause for a new trial. Code, § 5874 (5285).

Where the plaintiff testified that when riding on one of the electric cars of the defendant company, he was thrown therefrom by a sudden jerk of the car, it was not error to allow a witness to testify, over defendant's objection, that the effect of suddenly turning on too much electricity to such a car would be to cause it to start too quickly, the objection being that there was no evidence in the case that any electricity was turned on. Smith, 121/663. Cited, 123/97.

In a suit, Mozeley, 79/463, against a street-railway company to recover for an injury alleged to have been received by a passenger in leaving a car, it was error to charge as follows: "If the plaintiff signaled the driver to stop, and the driver did not stop so as to allow the plaintiff reasonable opportunity to alight with safety, but the driver only slackened his speed, and the plaintiff, to avoid being carried beyond his destination, and availing himself of what opportunity was afforded him to alight, endeavored to get off the car while in motion and was thrown by a sudden jerk of the car, the defendant would be liable, provided you believe from the evidence that the driver was negligent in not stopping the car altogether." This charge should have been qualified by saying, if the jury further believed that the plaintiff used all reasonable and ordinary care and diligence to avoid the consequences of the defendant's negligence to himself. Cited, 81/275; 83/446.

340. Safe place and time for alighting.

Although it is the duty of a street-car company to select a reasonably safe place for landing passengers wherever it may stop a car for that purpose, yet, if the place be safe for a passenger to get off while the car is at rest, the company is not responsible for any peril which the passenger incurs, without its fault, from attempting to alight after the stoppage has terminated and the car has been put in motion, provided a reasonable time for alighting was allowed while the car was at rest, and the conductor did not know that the particular passenger intended to get off at that place, and did not see him attempting to get off in time to warn or prevent him from so doing while the car was in motion. When a car stops because of an obstruction on the track, and not to afford any passenger an opportunity for getting off, the company is not responsible for the

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safety of the place as one for getting off, whether the car, at the time the passenger undertakes to do so, be in motion or at rest, the conductor not seeing the passenger, or being aware of his purpose, at the time the attempt to get off is made. This, however, would not justify the company in negligently running over him, if, by accident, he failed to gain a firm footing on alighting, but fell on a parallel track, exposing himself to danger on that track. *Glover*, 92/132. Cited, 120/513; 133/575.

Where a passenger was hurt in leaving a street-car, and his testimony showed that the car started before he completely left it, and there being no conductor, the driver testified that he did not know that the passenger was hurt at all, but that his habit was to stop till all his passengers got off, and that he did so that night, and another witness testified to hearing the exclamation of the passenger to the effect that he was hurt, and on going to him, found him injured where he attempted to alight, even more than slight neglect was shown. There being no conductor, it was the business of the driver to see that his passenger safely landed before he started, after stopping to let him land. *Findley*, 76/311.

The negligent conduct of a street-car conductor in calling a street crossing before his car had arrived at the street announced, thereby inducing a lady passenger to alight, at night and during a severe rainstorm, at a strange place remote from her destination, is to be regarded as the proximate cause of injuries sustained by reason of her slipping and falling upon a curbstone which she was unable to see, because of the darkness, while endeavoring with due care to make her way homeward along a street with which she was unfamiliar. The passenger was under no legal duty to apply for shelter at houses in the vicinity of the place where she was induced to alight from the car, rather than attempt to reach her destination on foot over a highway which was in a reasonably safe condition for travel by pedestrians. If she could not by the exercise of ordinary care have discovered that she was invited by the conductor to disembark at a point short of her destination, she was entitled to recover damages because of illness brought about by exposure to the weather after leaving the car, the burden being upon her to show that her illness was caused by such exposure rather than by other causes for which the defendant company was not responsible. In such a case, no presumption of negligence is raised by law against the defendant from the bare fact that the plaintiff sustained an

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injury, and the burden rests upon the plaintiff to prove the allegations of fact upon which she relies for a recovery. *McAllister*, 126/447. Cited, 135/845.

A charge that it is the duty of a street-car company to select a reasonably safe place for landing passengers, wherever it may stop a car for that purpose, states a sound legal proposition, and is not open to the criticism that it impliedly instructs the jury that a failure to perform such duty would be negligence per se. *Cobb, J.*, said: "It is the duty of a street-car company to select a reasonably safe place for landing passengers wherever it may stop a car for that purpose. The duty which the law imposes upon an ordinary railroad company, to provide and maintain a safe place for landing its passengers, has no application to a street-car company operating its line along a public street, or road; but the duty imposed upon such a company is, as stated, to select a reasonably safe place for landing its passengers, and to make such selection with reference to getting off the car while the same is at rest. The company is not responsible for any peril which the passenger incurs, without its fault, after the stoppage has terminated, and the passenger has secured a safe footing upon the street. *Glover*, 92/133 (10); *Nellis on St. Surf. Rds.* 449. If the passenger selects the place to alight, and the employees acquiesce in such selection, by stopping the car at the place chosen, and the passenger be well acquainted with the place, or the danger of attempting to alight there be apparent to him, and he is injured while alighting, as a consequence of the character of the place, and without fault on the part of the employees, the company would not be liable. If, however, the passenger selects a place which is reasonably safe, and the car has stopped, and on account of the darkness the passenger can not determine whether the car has stopped at the place designated, and the conductor in charge of the car permits the passenger to attempt to alight, without informing him that the place selected has not been reached, and also without informing him as to the dangers incident to alighting at the place at which the car has actually stopped, then the company would be liable, if the passenger is injured in alighting as a consequence of a danger of which he was not aware, and which, on account of the darkness, was not apparent to him at the time he attempted to alight, or, after having stepped from the car, attempted to proceed along what would have been a safe way in the event the car had stopped at the place

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selected. *Nellis on St. Surf. Rds.* 485, 524; *Henry v. Street Ry. Co.* (Wash.), 64 Pac. 137. Applying these principles to the facts of the present case, the petition set forth a cause of action, and was not subject to the objections raised by the demurrer." *Vining*, 120/511; 123/770. Cited, 126/449; 134/869.

Generally the duty which the law imposes upon an ordinary railroad company to provide and maintain a safe place for landing its passengers is not applicable to a street-car company operating its line along a public street of a city, and not stopping at regular places selected by it or providing places for passengers to get on and off of its cars, but stopping such cars at street crossings or various intermediate places upon signal from a passenger. *Vining, supra*. Under such circumstances it is the duty of the company, and its agents or employees representing it, to use due diligence to select a reasonably safe place for landing its passengers, and to make such selection with reference to getting off the car while it is at rest. *Turner*, 134/869.

In *Shields*, 1 G. A. 172, the plaintiff alleged, that the negligence of the company consisted in the fact that the car on which she was a passenger "did not stop long enough for her to alight, and that while she was in the act of alighting, the car was suddenly started, throwing her to the ground." During the trial of the case, she filed an amendment to her declaration, setting up other acts of negligence, to wit: "First, that the defendant failed to afford her a safe place and safe means for alighting at said time and place; and second, that the step was too high for her to alight in safety." The court below withheld from the consideration of the jury, in his charge, the question of negligence alleged in the amendment to the petition. On this point the court charged the jury as follows: "The court charges you that you can not, under the evidence in this case, take this amendment under consideration. You will only take the case as it stands in this declaration, without amendment; because the court holds that under the undisputed evidence in this case, there is no case made out, under the amendment as set out, of a defective step or too high a step, or something of that kind." It was held that in an action for personal injuries, by a passenger against a street-car company, there must be damage to the plaintiff and negligence by the defendant, causing the injury, to authorize a recovery. Where an amendment to the original petition sets up distinct acts of negligence, to entitle the plaintiff to

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recover on the amendment the evidence must show not only the existence of such negligence, but that such negligence was the direct and proximate cause of the plaintiff's injury; and where the plaintiff's own testimony utterly negated the fact that the acts of negligence alleged in the amendment had anything to do with her injuries, but, on the contrary, showed positively that the injuries were caused solely by the negligence alleged in her original petition, the court did not err in withdrawing the amendment from the consideration of the jury. Especially is this true where the other evidence in the case failed to establish negligence on the part of the defendant in the matters alleged in the amendment.

341. Diligence as to ropes, gates, bars, and sagging wire.

Where it was alleged by the plaintiff in his petition that "the defendant, well knowing that it was dangerous to allow passengers to alight from a car on the side next to that from which another car was approaching, nevertheless took no steps to prevent passengers from alighting," it was not error to admit testimony showing that the defendant had placed no ropes, guards, or other protection to prevent passengers from alighting on that side of its car next to said parallel track; the question as to whether such omission amounted to negligence being left entirely to the jury. *Bates*, 103/333.

In *Glover*, 92/132, it was held that an electric-railway company which has provided its cars with gates to prevent passengers from alighting on the side next to a parallel track can not defend itself against the charge of negligence in not keeping one of the gates closed, by the evidence of its president "as to observations he had made in reference to electric street-car lines, cable-car lines, and other street-car lines operating on double tracks, that he had made recently in various cities of the United States in reference to the use of gates on the cars, and to show that gates are not used." *Bleckley, J.*, said: "The negligence charged as to gates was not having the gate of this particular car closed on the side next to the parallel track. We think what the president of the company would have testified as to his observations on other double-track lines of street-cars in various cities was not relevant, and was consequently properly rejected. Two reasons against the admissibility of this evidence occur to us. The first is that the practice of other lines would not serve for comparison on the question of diligence unless

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it was shown that these lines were properly equipped and managed, or were so recognized and reputed to be by experts in the business; the other is that it was not stated whether the other lines had gates to their cars or not, but only that gates were not used. If the lines examined by the president were without gates to their cars, their practice in not using gates would throw no light on the diligence of a company which, like the defendant, has provided gates, but omits to use them." Although there may be no negligence whatever in the failure of an electric street-railway company to have gates to the platform of its cars, for the purpose of guarding against accidents to passengers by preventing them from leaving the cars on the side next to a parallel track of the same company, in the street, yet when a particular company has such gates to the platforms of its cars, not to keep them closed may or may not be negligence in the given instance, and this is a question of fact for the jury. Bleckley, C. J., said: "There may be no negligence whatever in failing to have gates, for the very highest order of equipment may be dispensed with, provided the equipment is sufficient to come up to the standard of extraordinary diligence. This standard may be reached short of the very best or the superlative of the attainable. But, when a company has provided gates, due diligence might require it to use them, and failure to use them might be negligence in the given instance. Whether it would be or not is a question of fact for the jury. There was no error in so treating it; and this is so, irrespective of the particular object which the company had in view in procuring the gates, or of its own practice in their use. A hackman might put brakes on his hack for use in descending mountains only, and might restrict the use by his own practice to the making of such descents; but, having them upon his vehicle, it might be negligence not to use them on proper occasions, in descending ordinary hills as well as mountains. Extraordinary diligence may require the carrier to use what he has, though it would not require him to have as much as he has provided." Cited, 133/577.

When a street-railway company with reasonable promptness discovers the sagging of one of its trolley-wires, which has been unexpectedly caused by the falling of a wire belonging to another, and immediately takes proper steps to prevent its wire from causing injury to travelers in the street over which the same is suspended, the company meets the legal requirements as to diligence

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under such circumstances. Notice to the servant of a corporation, with respect to a matter over which he has no authority and as to which he has no duty to perform, is not notice to the corporation. *Read*, 115/367. Cited, 124/1052.

In an action against a street railway company to recover damages for the death of a person by alleged negligence, the relative questions of the diligence or negligence of the deceased and the defendant are for determination by the jury, where it appears that the street railway company operating open cars allowing passengers egress from either side, stopped its car just after clearing a cross street, and a passenger alighted on the side next to a parallel track and proceeded five or six steps along the space between the tracks, until he reached the street crossing, and then attempted to cross the parallel track, when he was struck and killed by a car on the parallel track running at a dangerous and reckless rate of speed, notice of the approach of which was not given by the sounding of a gong, and the ordinary noise of its running could not be heard because of the loud and rumbling noise made by the departing car from which the passenger had just alighted, and which could not be seen because it had not come into view, and also because of the shadow produced by an electric street lamp. A petition by the widow of the deceased against the railway company, alleging the foregoing facts, is not open to general demurrer. In an action of the character described in the foregoing note, it is competent for the plaintiff to allege and prove, as explaining the care and diligence of the person killed, that the car from which the deceased alighted was not equipped with bars, nor was the deceased warned by the railway company's servants, as they saw him alight from the side of the car next to the parallel tracks, of the danger incident thereto. *Asbell*, 133/573. Cited, 8 G. A. 192.

342. Inexperienced minor killed on a parallel track.

In *Glover*, 92/132, a mother sued for the homicide of a minor son. The declaration alleged that he resided in the country and had never before ridden on an electric car. He got off the car, at which moment another of defendant's cars, running on a parallel track, ran over and killed him. It was held that the fact that the passenger killed had never before ridden upon an electric car was admissible in evidence, for the purpose, at least, of illustrating the cause of his failure to alight from the car in safety. *Bleckley*, C.

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J., said: "The evidence was admissible, not for the purpose of changing or affecting the measure of the company's diligence, but as a fact tending to illustrate the cause of his failure to alight in safety. The jury in looking at the facts and circumstances of the homicide would naturally desire to classify the particular passenger, not alone by his age, but also by his experience or the want of it in handling himself on electric cars. Familiarity with this mode of transportation would qualify him to see and appreciate danger which he would not be likely to observe if he was wholly without experience. With experience he might be chargeable with fault; without it, with none. And hence in the one case his failure to come off safely might be attributable to his own negligence, in part or in whole, whereas, in the other case, he might be treated as free from any negligence whatever. It may be that the evidence might have other bearings, but it has this, at least."

343. Jumping from the car.

It is gross negligence in a passenger on a street-railway to jump from the car when it is going at a speed of twenty miles an hour, whether he knows or does not know that the car is going so fast. That the city ordinance restricted the speed of the car to seven miles an hour would make no difference. The presence of the conductor, and his silence on hearing another passenger tell the plaintiff that the car was not going to stop, and he had better get off, will not justify him in jumping from the car and causing his own injury. *Masterson*, 88/436.

The plaintiff showing by his own evidence that although he had requested the driver of the street-car to stop at a designated place, and had received a rude and profane answer, yet, upon failure of the driver to stop, plaintiff had jumped from the car while it was in motion, and without again requesting the driver to stop, or notifying him of his purpose then to alight, and it not appearing that the driver, when he struck the team, knew that the plaintiff was attempting to alight, or that there was any such emergency as would justify the plaintiff in alighting from the moving car, the court committed no error in granting a nonsuit. *Outen*, 94/662.

344. Diligence at crossings, of streets and tracks.

In charging the jury upon negligence, the court should not enumerate acts or omissions which are wholly outside of any degree of

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diligence which the law requires. An electric-railway company is under no duty to stop its cars before reaching the crossings of public highways for the purpose of looking and listening by the motormen, or to enable them to look and listen, when there is no apparent reason for so doing. Simmons, J., said: "These companies are chartered for the benefit of the public. The public require rapid transit, and if a motorman driving one of these cars were compelled to stop and look and listen for the approach of every wagon or buggy likely to cross the railway-line, the public would be greatly inconvenienced, and rapid transit would be rendered impracticable. The cars of this railway company had the superior right of way, and people who intend to cross its track should be careful to look and listen in order to avoid a collision with them. It is the duty of the motorman also to look and listen when approaching a public crossing, in order to avoid a collision with persons crossing, and due diligence would probably require him to ring his bell, or give some signal of his approach to the crossing, to put persons about to cross upon notice of his approach; but we do not think the law requires him to stop the car for that purpose, unless he sees that a collision can not be avoided unless he does stop. On this subject, see Booth, St. Ry. Laws, § 304 et seq., and cases cited; 4 Am. & Eng. Enc. Law, 'Crossings,' p. 951, par. 44, and note." Beasley, 94/142. Cited, 120/907; 8 G. A. 192. See Barnes, *infra*.

There being evidence to warrant the jury in finding that the defendant's motorman, after seeing that there might be a collision with the wagon in which the plaintiff and his driver were riding, negligently approached the crossing without having his car under complete control, and also in finding that there was some negligence on the part of the plaintiff or his driver in going upon the crossing, but that, after getting upon the same, they could not then, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, and the recovery being manifestly for a less amount than that to which the plaintiff would have been entitled had there been no fault with which he was chargeable, the verdict, after its approval by the trial judge, will not be disturbed. Bryan, 94/632.

A rule of the defendant company requiring its motormen to keep their cars under full control on approaching all street-crossings, and when there is a car standing at a crossing, taking on or letting off

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passengers, or if they see that they are about to meet a car on a street-crossing, to slow up and see that the track is clear before attempting to pass, was admissible in evidence, as tending to show that the company regarded such a point on its line, when being approached by one of its cars, as more or less dangerous to passengers and others. *Bates*, 103/333.

In *Elarbee*, 6 G. A. 137, it was held that a street-railway company has only an equal right with the traveling public to the use of the street in which its track is laid. In using the highway at a public crossing the law gives to the traveler on the highway the same right to cross the track that it gives to the car to cross the highway, and imposes upon both the same duty of exercising reasonable care and prudence to avoid injuries. It is the duty of a street-railway company to exercise extraordinary care for the safety of its passengers. As an incident to this obligation, where, in compliance with a city ordinance, street-cars are brought to a full stop just before reaching a crossing of tracks, and it is customary on such occasions to stop long enough for passengers to get on and off without giving any signal therefor, it is the duty of the proper servant of the company to exercise extraordinary diligence, before signaling the car ahead, to ascertain if any passengers desire to alight from the car, and, if so, to give such passengers a reasonable opportunity to alight in safety. *Randall*, 117/165. Cited, 120/226.

Code, § 2687 (2234) providing that "all engine-drivers and conductors must cause the trains which they respectively drive and conduct to come to a full stop within fifty feet of the place of crossing," where the tracks of separate and independent railroads cross each other, does not apply to a street-railway so as to compel it to stop its cars before crossing a steam-railroad track. *Joiner*, 120/905.

"What particular means or measures of diligence would be appropriate for use under the circumstances should be left to the jury." Accordingly, it was not incumbent on the court to give, as requested, a charge that one who drives on and along a street-railway track laid in a public highway "should be careful to look and listen with ordinary care to avoid a collision." *Fish, J.*, said: "It was not erroneous to refuse to charge the jury that one who drives on and along a street-railway track, laid in a public highway, 'should be careful to look and listen with ordinary care to avoid a collision.' Whatever may be the rulings on the subject in other jurisdictions, it is well settled in this State that it is not incumbent upon the court

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to instruct the jury that it is the duty of one who attempts or intends to cross a railroad track to use his senses of hearing and seeing before stepping on the track. * * * If the court should charge, in a case of this character, that it was the duty of a party to do a specific thing, would it not be equivalent to saying that the omission to do that thing would be negligence? It is true that in the opinion rendered in *Beasley*, *supra*, it was said that 'people who intend to cross its [the street railroad's] track should be careful to look and listen in order to avoid a collision.' The question in that case was, whether an electric street-railway company is under the duty to stop its cars before reaching the crossing of public highways, for the purpose of looking and listening by the motormen, or to enable them to look and listen, when there is no apparent reason for so doing; and the question was decided in the negative. What people who are about to cross the railroad track should do was not a question in the case, and therefore what was said as to their duty in that respect appears to be obiter; but even if it were not, it would not be controlling in the light of the former express rulings on the subject." *Barnes*, 121/443. Cited, 121/487; 5 G. A. 630.

It was not erroneous for the court to refuse to instruct the jury that it is the duty of one who attempts or intends to cross a railroad track to use his powers of hearing and seeing before going on the track. What an ordinary prudent man would do under the circumstances is a question for the jury. *Lovelace*, 121/487.

In *Barnes*, 121/446, it was held that where the court properly instructed the jury as to the respective rights of the parties on a question in the case, the refusal of a request to give a charge containing a general proposition of law, though pertinent to the question, was not cause for a new trial. *Fish, J.*, said: "The plaintiff was driving in his buggy longitudinally on the defendant's track, in a public highway beyond the city limits, when one of the defendant's cars came in collision with the buggy, resulting in the alleged injuries and damages for which he sued. On the trial the defendant's counsel requested the court to charge the jury that 'the street-railway company, at the place where the alleged injury to the plaintiff is alleged to have occurred, had the superior right of way.' The court refused this request, but did instruct the jury that 'the public have a right to use a public highway upon which a street-railway is operated, and the company has a right to use the highway upon which its track is laid, and to operate its cars

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thereon; but it is incumbent upon the public, in * * * driving longitudinally on the track, to exercise ordinary care and diligence * * * not to interfere with the use of the track by the railway company,' and to exercise a like degree of care to avoid collisions. In view of these instructions, we do not think the refusal of the request was erroneous. A street-railway company has no superior right to the use of the public highway in which its cars are operated, over the rights of other users of the highway, except that, from the necessity of the case, the latter, at places other than crossings, must give the company's cars the right to pass when occasion requires. In other respects, the rights of street-railway companies, in using public highways with their cars, are precisely like the rights of others who use the highways with other vehicles. As the highway is laid out for passage, each passer has a right of passage, subject only to the condition that he does not unnecessarily interfere with such use by others as they are entitled to. *Butelli v. Railway Co.*, 59 N. J. L. 302; *Nellis on Street Railroad Accident Law*, § 15; *Booth on Street Railway Law*, § 303; 27 Am. & Eng. Enc. L. 57, et seq. The instructions given to the jury clearly recognized, to the full extent, the superior right of way the defendant company had in the use of its track when the collision occurred, and the jury were much more likely to get from the court's instructions a correct understanding of the principle involved than they would have been from the general abstract proposition embodied in the request." Cited, 6 G. A. 138.

345. Plaintiff's want of diligence.

In *McGrath*, 93/312, which was a suit to recover damages caused by a collision between a wagon and a street-car, it was held, that the evidence showing that, in approaching the point at which the injury occurred, the driver of the wagon was engaged in the violation of a city ordinance by driving at a prohibited speed, and the circumstances being such as that if this violation had not occurred the negligence of the defendant would not have produced the injury if ordinary diligence had been observed by the driver, there was no error in granting a nonsuit.

In *Cain*, 97/298, the plaintiff was injured by an electric car. The negligence alleged was that the car was operated by a motorman alone, who was making change for passengers, and neglecting his duties as motorman, and that no signal was given of the ap-

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proach of the car until it was too close to the plaintiff for him to escape. It appeared that the plaintiff stepped upon the track and stood there until the car struck him. He had time, after he saw the car coming, to have stepped out of its way. It was held that the evidence introduced by the plaintiff showing clearly that, even if the defendant was negligent at all, the plaintiff, after his negligence began, might, by the exercise of ordinary care, easily have avoided being injured, he was not entitled to recover. The court was therefore right in granting a nonsuit.

346. Evidence that plaintiff thought the motorman would stop the car.

The plaintiff having testified that there was nothing to hinder the motorman from seeing him, and that there was nothing between the motorman and the witness and his cart, there was no error in allowing him to state he thought or supposed the motorman would stop the car, this testimony illustrating and explaining the conduct of the plaintiff in managing his horse upon the occasion under investigation. *Beauchamp*, 93/6.

347. Collision between a dummy-engine and wagon of another in which plaintiff was riding.

In *Powell*, 89/601, it appeared that the plaintiff was invited by Stewart to ride in a wagon that he was driving. The horse took fright at one of the defendant's dummy-engines, and became uncontrollable. A collision occurred between the engine and the wagon. The plaintiff sprang from the wagon, but before she struck the ground, the collision occurred, and she was caught between the engine and wagon, and injured. It was held that if the plaintiff herself was free from negligence, and her injury was due to the concurrent negligence of the railroad company and the person with whom she was riding in a wagon, he not being her servant, and it not appearing that she was the owner of the horse or wagon, or that she had any agency or concern in procuring or in driving the same, and nothing appearing which tends to show that she was aware of any incompetency in the driver, the company is liable to her for all the damages consequent upon the injury, and can take no credit as to any part thereof on account of the contributory negligence of the driver of the wagon. Cited, 128/385; 8 G. A. 356.

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348. Injuries to children.

The case *Perry*, 101/400, was brought to recover damages for injuries to a child six years old, caused by running an electric car over it. It was held that in an action against a street-railroad company by a minor to recover damages for personal injuries sustained by being run over by a moving car, when it appeared by the evidence for the plaintiff that there was a pile of lumber in the street on one side of and near the railroad-track, not placed there by the defendant, behind which the plaintiff and other boys were playing, and as the car approached the end of such pile of lumber the plaintiff suddenly ran on the track immediately in front of or against the front part of the moving car, and was struck and injured, and when it further appeared by the same evidence that the line of track, in the approach to and at the place where the accident occurred, was open to the view of the motorman and free from obstruction, that the car was not being run at a reckless and unusual rate of speed, and that the plaintiff could not have been seen from the car until he came on or within thirty inches of the track, and that as soon as plaintiff came on or near the track the brakes were applied and every effort made to stop the car, it was not error to grant a nonsuit. It affirmatively appearing that the motorman could not have seen the plaintiff in the street before he appeared on or near the track or knew he was there, and there being no proof that such place was used by children in playing, or that there was anything to put the motorman on notice that persons were accustomed to be behind the pile of lumber, or that on this particular occasion children were in fact playing about and behind the same, his failure to sound the gong on approaching such pile of lumber was not negligent relatively to one who ran out suddenly in front of a moving car or against it, so to authorize the latter to recover for injuries so sustained, when no negligence on the part of the motorman is shown in his efforts to stop the car and prevent the injuries when the person first came on or near the track, but, on the contrary, it affirmatively appeared that the brakes were promptly applied and the car stopped as soon as possible. This is true, even though the person injured be a minor of tender years. Little, J., said: "It is undoubtedly the duty of the motorman, in propelling a car through the public streets, to notice the presence of other vehicles and pedestrians ahead of his car, and at all times be watchful to see that the way is clear; and where

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he has reason to apprehend danger, or should in the exercise of ordinary care become cognizant of danger, he should regulate the speed of his car so that it may be quickly stopped should occasion require it. *Humbird v. Railway Co.* (Mo. Sup.) 19 S. W. 69. If a person be seen upon the track, who is apparently capable of taking care of himself, the motorman may assume that he will leave the track before the car reaches him, and this presumption may be indulged so long as the danger of injuring him does not become imminent, but no longer. But he can not act upon that presumption with reference to a child too young to appreciate its danger. The degree of diligence required is proportionate to the duty imposed, and the degree of negligence imputed corresponds to the degree of diligence exacted. If, to a reasonable mind, viewed, not from results, but from the situation and surroundings as they existed at the time of the act which produced the injurious effects, there was no impending danger, no diligence could be exacted. 'Ordinary care' is a relative term, the standard of which increases or diminishes accordingly as the danger is greater or less. If the happening of an event is beyond human anticipation, no one would be negligent in failing to take precautions against that event. Accordingly, if a child suddenly and unexpectedly appear in the vicinity of a railroad-track, under such circumstances that, by the exercise of proper caution and attention, the motorman could not have discovered his presence in time to avert an accident, the company will not be liable." Cited, 8 G. A. 355.

In *Wynn*, 91/244, it was held that whether a boy eleven years of age has sufficient capacity to understand and appreciate the danger of riding in an unsafe and hazardous position on a street-car, and could, by the exercise of that degree of care and diligence to be expected of a boy of his years and experience, have avoided an injury to himself while thus exposed to peril, occasioned by the too rapid driving of the car around a curve, is a question for the determination of the jury, under proper instructions from the court.

In an action against a street-railway company the petition, in substance, alleged, that within a month prior to the filing of the suit, and at a stated place in the county of defendant's domicile, plaintiff's minor child was wantonly pushed from a moving car on defendant's line of road by a person who at the time was "in the employment and service of the defendant company on that car,

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thereby causing the child to fall upon defendant's track and the car to run over and crush his leg." The child's life expectancy, and his earning capacity and the diminution thereof by reason of the injury, and the amount of damages sustained by the plaintiff, were alleged. Held, that a cause of action was set forth, and it was error to dismiss the petition on general demurrer. *Lindsay*, 46/448; *Smith*, 69/268 (2); *Smith*, 100/96; *Bostwick*, *Ib.* 96; *Godkin*, 104/655 (1); *Primus*, 126/667.

349. Care due to a trespasser of tender years.

Where a boy eleven years of age, without the intention of paying fare, but with the purpose of stealing a ride, boards a passing street-car, and secretes himself from observation so as to avoid detection, he is, in law, a mere trespasser, unless his presence on the car be actually known, and assented to, either directly or by implication, by the driver or conductor. Assent to the boy's riding upon the car free will not arise by implication from the mere fact that the driver discovered him, knew of his presence, and made no demand upon him for fare; the driver being charged simply with the duty of properly managing his team, and neither required nor authorized to collect the fares, or attend to the wants of passengers—a conductor having been provided by the street-railway company for these purposes. While the degree of care which a street-railway company owes to a trespasser upon its cars is not more than ordinary or reasonable diligence, yet, where such trespasser is a child of tender years, due regard should be paid to the known indiscretion of childhood, and the inability of children to exercise proper precautions for their own safety. The duty resting upon the company to employ the proper precautions to avoid injury to children entering its cars would comprehend the exercise of reasonable diligence to guard and shield from danger a child not of the age of discretion to understand and appreciate the peril of riding in an unsafe and exposed position. Accordingly, it would generally be negligence to allow such a child to ride upon the steps of the front platform, when his presence in a situation thus exposed to danger is actually known, or the circumstances are such as would make failure to note his peril palpable neglect and inattention to duty on the part of those having the control and management of the car. *Lumpkin, J.*, said: "It is proper to add, however, that the rule herein announced should be construed in its

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fair and legitimate sense, and applied wisely and justly. It can not be required of a driver or conductor that he shall maintain a constant and unremitting watch over the movements of a child upon his car, and devote to such child his entire attention, to the exclusion of other and equally pressing and important duties devolving upon him. Booth, St. Ry. Law, § 351. All that can or should be expected of the company's servants is that they shall exercise that degree of diligence which would be observed by a reasonably prudent and cautious man under similar circumstances. *Standford v. Railroad Co.*, 136 Pa. St. 92, 20 Atl. Rep. 799. In all cases wherein it has appeared that neglect of duty in this respect was unquestionably palpable and inexcusable the railroad company has been held liable. *Moore, infra*; *Railway Co. v. Caldwell*, 74 Pa. St. 421; *Brennan v. Railroad Co.*, 45 Conn. 284; *Wilton v. Railroad Co.*, 107 Mass. 108; *Railway Co. v. Bohn*, 27 Mich. 503. The opinion in the case last cited was delivered by Justice Cooley, the now eminent text-book writer, and is an able and comprehensive exposition of the law upon the subject with which we are now dealing. But care has been taken that this rule should not operate harshly or oppressively, and where the company has introduced proof of special facts and circumstances explaining and justifying the omission of its servants to warn and compel a heedless little one to occupy a place secure from danger, the courts have uniformly afforded to the company ample protection against unjust and unauthorized verdicts. *Railroad Co. v. Kelly* (Pa. Sup.), 11 Amer. & Eng. R. Cas. 123; *Clutzbeher v. Railway Co.* (Pa. Sup.), 1 Atl. Rep. 597; *Butler v. Railway Co.*, 139 Pa. St. 195, 21 Atl. Rep. 500; *Wrasse v. Traction Co.* (Pa. Sup.), 23 Atl. Rep. 345." *Wynn*, 91/344. Cited, 120/1008. Dis., 7 G. A. 182.

In *Moore*, 83/453, a child nine years of age was injured by a street-car. The driver left the plaintiff and a negro boy on the front platform and went inside and sat down to eat his breakfast. The negro pushed plaintiff off, or he fell off, and was hurt. It was held that it was negligence for the driver needlessly to withdraw from the front platform, leaving the plaintiff and another boy thereon, and it was negligence not to be there ready to stop the team when the plaintiff fell or was thrown by the other boy off the platform upon the track in front of the car, the two boys engaging in a scramble to drive the horse, the reins having been left within their reach. Cited, 91/353.

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350. As to the duty of a conductor to observe the track in front of the car, and persons on the highway.

It does not follow, as a matter of law, that it is the duty of a conductor of a street-railroad car to observe the track in front of the car and that portion of a street contiguous to the track on either side. In the absence of any proof showing that he was under any obligation of this kind, it was error for the court to instruct the jury that such was his duty, and a failure in its discharge would be negligence. *Holms*, 103/655.

Where a motorman in charge of an electric car sees apparent or probable danger of an accident to a person on the highway adjacent to the track, or by the exercise of reasonable care could see that danger is imminent, caused by the approach of the car, it is his duty to use reasonable care to avoid the accident. What would be reasonable care would be a question for the jury, under the facts of the particular case. A motorman in charge of an electric car who observes, or in the exercise of reasonable care could observe, a vehicle containing several occupants near the track, and that the animals pulling the vehicle are frightened at the approach of the car, and are acting in such manner as to lead a person with ordinary prudence to apprehend danger of a collision between the car and the vehicle, is bound to bring the car under such control that it can be stopped, if necessary, to prevent a collision or injury to the occupants of the vehicle. If the approach of the car and the consequent fright of the horse attached to a vehicle in close proximity to the track cause one in the vehicle to jump therefrom in order to escape apparent or imminent danger, it would be for the jury to determine whether the emergency did in fact exist, or was reasonably thought by the person so jumping to exist, and whether the act of jumping, under all the circumstances, was contributory negligence. *Hill, C. J.*, said: "It is contended also by the defendant that the testimony in behalf of the defendant, that the deceased jumped out of the carriage on to the track, which was not disputed, showed such contributory negligence on her part as to prevent her father from recovering. It has been frequently decided by the Supreme Court of this State, and can not reasonably be denied, that if one, by his negligent or wrongful act, causes an emergency wherein another apprehends a danger from the consequences of such negligent or wrongful act, and does an act to avoid the consequences,—such as jumping from a running car to

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avoid an impending collision, and acts of like character,—this does not constitute contributory negligence which can be set up by the party whose conduct caused the emergency. If the decedent saw that the mules were frightened by the approaching car, that the motorman in charge of the car made no effort to stop it, and that there was danger of a collision by the backing of the carriage on the track in front of the rapidly approaching car, and, in her effort to avoid the consequences of the motorman's negligence, she endeavored to get out of the carriage and stumbled on to the track in some unaccountable manner, this was not an act of which the defendant can take any advantage. Paulk, 24/356; Winn, 26/250; Johnson Co., 38/409; Smith, 83/671 (10 S. E. 361); Dickey, 90/491 (16 S. E. 212); Simmons, 92/658 (18 S. E. 999); Roberts, 116/505 (42 S. E. 753). And in the case of Sears, 59/437, it is held that this would be true although in fact such emergency did not actually exist, if it was believed in good faith that it did exist. But whether the emergency existed, or whether the decedent believed that it did exist when in fact it did not exist, are questions for the determination of the jury. Sears, *supra*; Roach, 64/635." Dabbs, 8 G. A. 350.

351. Company must exercise care to save the life of one known to be in peril.

In Walker, 112/725, the following charge was held to be correct: "Even if the deceased might have been negligent at the time he stepped upon this track, still such negligence would not prevent a recovery by his widow in this case, if, after the deceased was put in a situation of peril and danger by being caught under the machinery of the car, if he was so caught, the defendant's motorman could have saved his life by the exercise of ordinary care. If one is put in imminent peril of life, even though that peril is brought about by his own negligence, if his presence is known to the railroad company, and if by the use of ordinary care his life could have been saved, the company is bound to use that care; and if it does not use such care, and injury ensues, the company would be liable. If a person is in a situation of imminent peril upon a railroad-track, a failure of the agents of the railroad company to exercise all ordinary and reasonable care to save the life of the person in danger, if his danger was known to such agent, would be such gross negligence as to amount to willfulness, and would entitle the

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plaintiff to recover. If you believe that the first force of the collision between the deceased and the car was the cause of the death of the deceased, then you would not inquire into the question as to whether his being dragged as alleged in the declaration was negligence on the part of the defendant company. If you find that Mr. Walker's death was caused by the first blow stricken by the car, and before said dragging commenced, your only inquiry would be as to whether, in the event leading up to the collision, Mr. Walker himself was in the exercise of ordinary care and diligence, or whether the collision was an unavoidable accident, for which nobody was to blame. In this aspect of the case, if you find that the negligence of Mr. Walker, if there was any negligence, was not the sole and real cause of injury, and that by the exercise of ordinary care he could not have avoided the collision, and that the defendant failed to exercise ordinary care, then the defendant would be liable." Cited, 113/1046; 4 G. A. 438; 6 G. A. 689. Dis., 7 G. A. 182.

352. Sick people entitled to be treated as such.

The suit of Hardage, 93/457, was for wrongful expulsion from a car. It was held that it appearing that the conductor of defendant's car was informed that the plaintiff and her child were sick when they boarded the car, there was no error in allowing the plaintiff to testify that she took the car because of the sickness of herself and child, or that her husband desired her to take the car for this reason. Bleckley, C. J., said: "Surely, it was competent for her to testify that she took the car because of the sickness of herself and child, or that for this reason her husband desired her to take the car. If it was a fact that she and her child were sick, and the conductor knew it, why should this not go before the jury? If they were sick people, they were entitled to be treated as such, the conductor knowing of their condition. It is true that whether the sickness constituted the motive for going by the cars or not was of little consequence, but it was not wholly irrelevant, inasmuch as it served to account for the plaintiff's presence on the car, and her relation to the company as a passenger." Cited, 124/359; 135/211.

353. Evidence as to company's diligence generally, rejected.

In Randall, 85/297, it was held that testimony of the president

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of the defendant corporation as to the degree of care exercised before the injury in the selection of drivers for its horse-cars was not material to the question whether the driver was negligent at the time of the injury. The defendant was not charged with employing incompetent men, but that the driver was negligent at the particular time in question.

354. Payment of car-fare, making change and transfers.

A passenger upon a public conveyance may tender to the common carrier a larger sum than the amount due as fare, in payment thereof, and require the carrier to return the change. The sum tendered, however, must be a reasonable amount, and not unduly disproportionate to the amount of the fare. A street-railway company may enact and enforce a reasonable rule limiting the amount of change its conductors shall be required to make when a sum in excess of the fare is tendered by the passenger. A rule that the conductors shall make change to an amount not exceeding \$2 is reasonable; and where such a rule exists, the tender of a \$5 bill in payment of the five-cent fare, with a request for a return of the change, is not a good tender of the fare. *Wynn*, 6 G. A. 77.

In a suit for damages against a street-railroad company because the plaintiff was ejected from one of its cars by the conductor thereof, the petition alleged, that the plaintiff tendered such conductor a \$5 gold coin for which to make change and take out his fare and that of his two companions, which the conductor refused to do; that in a loud and offensive manner he ordered plaintiff to leave the car; that upon the plaintiff remonstrating with him, the conductor seized the plaintiff and forcibly ejected him from the car; that the conduct of the conductor was "an outrage upon petitioner" and in violation of his legal rights, and plaintiff was subjected to great mortification and embarrassment in the presence of others on the car. Held, that the overruling of a general demurrer to such petition did not conclude the defendant from contending on the trial that \$5 was an unreasonable amount for which to require the conductor to furnish change in order to pay three fares. A passenger on a street railroad is not bound to tender the exact amount of fare, nor is the conductor who collects fares for such road required to change any denomination of money. In order to pay fare, a passenger may tender a reasonable amount and require the

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conductor to change the same. A street-railroad company has the right to make a reasonable rule fixing the maximum amount for which change will be made by the conductor for passengers to enable them to pay the amount of their fares on its cars, and such company may refuse to carry passengers who do not comply with such rule. Whether a rule of such company specifying such amount is or is not reasonable is a question of law to be determined by the court. A rule of such company, prescribing \$2 as the maximum amount for which the conductor shall supply change to passengers to enable them to pay the fare charged for transportation within the city, is a reasonable rule. Where a person on board the car of a street railroad tenders a \$5 gold coin to the conductor of such road having such rule in force, such conductor is not required to furnish change therefor to collect the fares charged for the transportation of such person and his two companions within the city; and where no other tender is made, such conductor may require such persons to leave the car. *Burge*, 133/423.

Although a street-railway company may not be required by law to carry a passenger on any other line than the one over which the car originally boarded runs, still if such company holds out that it will, when fare is paid on the first car, issue a transfer giving the right to ride on other cars of its lines, a request for a transfer is an acceptance of this offer, and the delivery of the transfer completes a contract under which the passenger is entitled to demand the right to ride on both the original car and the transfer car; and the amount paid to the conductor of the first car is the consideration for the right to ride on each car. The right to ride on the car to which the passenger is transferred is in no sense a gratuity. If a mistake is made by the conductor of the first car in issuing a transfer, and the passenger presents the transfer to the conductor of the second car and gives a reasonable explanation of the mistake of the conductor of the first car, the conductor of the second car must at his peril determine whether the passenger is entitled to a ride upon the transfer, notwithstanding it does not upon its face show such right. A condition on a transfer issued by a street-railway company, that "the holder, by accepting, agrees that should any controversy arise as to its validity, holder will pay fare and call at company's office for correction," is unreasonable and void. A threat by the conductor of the second car, to expel a passenger on account of a mistake in the transfer slip, is a legal wrong, giv-

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ing the passenger a right of action against the company, notwithstanding there is nothing insulting in the words or manner of the conductor, further than that a mere threat to expel might be deemed an insult. In an action brought to recover damages for a threat to expel a passenger from a street-car, who presented a transfer to the conductor which was defective through no fault of the plaintiff, but who, under the facts of the case, was entitled to a ride on the car, the measure of damages is not limited to the amount paid to prevent an expulsion, but general damages may be recovered as for an inexcusable trespass, even though there be no aggravating circumstances connected with the threat of expulsion. *Baxter*, 125/562. Cited, 6 G. A. 373.

Where a street-railroad company voluntarily permits passengers to transfer from one of its cars to another and continue their journey without the payment of additional fare, it is reasonable to require, as a condition precedent to the exercise of this right, that the passenger shall tender to the conductor of the second car a printed transfer check which must be used within a time indicated by punch marks on the check, provided a car upon which the passenger can be conveniently and comfortably transported passes the transfer point within the time so limited. A person who fails to comply with such requirement, and who refuses to pay fare, can not recover for an expulsion from the car, when he does not show that his failure to have a valid transfer check was due to the fault of some employee of the company having authority in such matters. It follows that no recovery can be had where the initial car does not reach the transfer point until after the time indicated by the punch marks on the check, and the passenger voluntarily leaves the car before it reaches such point and makes an unsuccessful attempt to walk to the transfer point before the time limit expires. In such a case it is the duty of the passenger to remain on the car and give the conductor an opportunity to make arrangements for his transportation on the transfer car; and this is true even though it is the custom of the company not to issue new transfer checks where the initial car is delayed. *Hornesby*, 120/913. Cited, 125/915.

A genuine silver coin of the United States, distinguishable as such, though somewhat rare, and different in appearance from other coins of this government, of like denomination and of later

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dates, is nevertheless a legal tender for car-fare, and a passenger ejected for refusal to make payment otherwise than by tendering such a coin is entitled to an action for damages. See *Railroad Co. v. Morgan*, 18 Atl. 904, 52 N. J. Law, 60. That the conductor declined to receive a coin of this character because he, in good faith, believed it was a counterfeit, will not relieve the railroad company from liability. *Keeny*, 99/266. Cited, 124/360.

355. Rule of the road—Making noises and stopping at stations.

In *Walker*, 93/462, it was held that "the rule of the road" in this State requires travelers with vehicles, when meeting, to each turn to the right. One may, from motives of courtesy, or for other reasons, waive his right to have another observe this rule, but is not bound to do so. The fact that one does waive this right, and in so doing drives into a dangerous place in the highway, and is thereby injured, affords no excuse to a wrong-doer who caused the dangerous place to exist, and will not prevent a recovery against the wrong-doer by the person so injured, if free from negligence and otherwise entitled to recover. *Bleckley, C. J.*, said: "That rule exists for the benefit of travelers, and not for the behoof of one who has wrongfully caused a bad condition of the road or street. The wrong-doer has no right to say that 'If you had not waived, in favor of another traveler, the place which was your due, the other might have been hurt, but you certainly would not.' Such a waiver, whether from courtesy or for any other reason, was not negligence on the part of the plaintiff, relatively to the defendant, and could not prevent him from recovering, if he was otherwise free from negligence. The rule which requires travelers, on meeting, to pass to the right, applies between traveler and traveler, that is, between those who use the road, and not between them and those charged with making the road or keeping it in repair."

It is the duty of a street-railway company, in operating its cars along a public road, not to interfere with the rights of individuals using such road by other modes of travel, by making unusual and unnecessary noises, such as are likely to frighten animals along such road; and for damages resulting from a breach of such duty the company is liable. *Joiner*, 120/905. Cited, 129/175.

In *Battle*, 120/992, it was held that in an action against a

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street-railway company, for damages alleged to have been sustained in consequence of the failure of one of its cars to stop at a given station on its line, in response to a signal to do so by a person there intending to board the car as a passenger, it should appear, from the petition, that it was the duty of the company to stop the particular car in question at that station for the purpose of taking on such person as a passenger. The petition in the present case failed to comply with this rule, and was therefore properly dismissed on demurrer. Fish, P. J., said: "The plaintiff's right to recover, under the allegations of his petition, depended upon whether the defendant company was under any duty to him, or his wife and child, to stop the particular car which his wife signaled, at that station, to take her and the child on as passengers. It is well recognized that railroad companies have the right to make reasonable rules for the regulation of their business and the performance of their duties to the public, and in pursuance of this right they may, in the absence of any statutory provision to the contrary, operate through trains for the carrying of passengers, or freight, which stop only at particular stations along their lines. There is no statute of this State which requires all trains to stop at every station along the line. It is well known that railroad companies operate special trains on which the general public are not permitted to ride. They also run freight trains, and work or construction trains, which do not carry passengers. Street-railroad companies may run cars of like character. They may, and do, operate suburban, or inter-urban cars, which do not stop at all stations, and special cars, work or emergency cars, and express cars which do not carry passengers. There was nothing in the petition to show the character of the car which failed to stop at the station in question upon the signal of the plaintiff's wife. So far as the petition shows to the contrary, it may have been a car of the character of one of those above enumerated, which did not carry passengers, or which did not, according to the schedule under which it was operated, stop at that particular station. We are clear, therefore, that, under the facts alleged in the petition, no duty upon the defendant to stop the particular car at the station in question, to take on the plaintiff's wife and child as passengers, was shown, and that the demurrer to the petition was properly sustained."

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356. Lawful to run cars on the Sabbath day.

In view of the dependence of the people for travel, in the cities where street-railroads have been established, by that mode of conveyance in going to church, visiting the sick, etc., the court declined to hold that the running of street-railroads was not the work of necessity as contemplated by the Penal Code, § 416 (422), nor that it was unlawful to run them on the Sabbath day. *Renz*, 55/126.

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357. Recovery for homicide.

By the Act of 1850 in all cases where death ensued under circumstances which would have entitled the deceased, if death had not ensued, to an action against the perpetrator of the injury, the legal representative of the deceased was allowed to maintain an action against the persons committing the act, one half of the recovery to be paid to the wife and children, or the husband, of the deceased, in case of the estate being insolvent. Cobb, 476. The case of Paulk, 24/356, was brought under that act by an administratrix. It was held that railroad companies were embraced under the terms "perpetrators of the injury" and "persons committing the act." The case of Kinney, 28/111, was also under that act and was by a mother for the killing of her minor son. It was held that

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she was entitled to sue as his "legal representative" and in no other right, and as such representative she was only entitled to sue if the circumstances were such that they would have entitled him to have sued had the injury stopped short of killing him. The Act of 1856 provided that if one should be killed by the carelessness, negligence or improper conduct of a railroad company, its officers, agents or employees, by the running of its cars or engines, the right of action to recover damages should vest in his widow, if any, if no widow, in his children, if any, and if no child, in his legal representative. The Code of 1863, section 2920, gave the right of action to recover for the homicide of the husband or parent, to the widow, or if no widow, to the child or children. By the Act of 1878 the plaintiff, whether widow or child or children, was allowed to recover the full value of the life of the deceased as shown by the evidence. Thus the law stood until the passage of the Act of 1887. It is codied in §§ 4424 (3828) and 4425 (3829) of the Code, and they are as follows:

358. The statute.

A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter to the surviving child or children. The husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child. Code, § 4424 (3828).

Definition of terms in preceding section. The word "homicide," used in the preceding section, shall be held to include all cases where the death of a human being results from a crime or from criminal or other negligence. The plaintiff whether widow or

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child or children, may recover the full value of the life of the deceased, as shown by the evidence. In the event of a recovery by the widow she shall hold the amount recovered subject to the law of descents, as if it had been personal property descending to the widow and children from the deceased, and no recovery had under the provisions of this section shall be subject to any debt or liability of any character of the deceased husband, or parent. The full value of the life of the deceased, as shown by the evidence, is the full value of the life of the deceased without deduction for necessary or other personal expenses of the deceased had he lived. Code, § 4425 (3829).

The principles embraced in the two sections may be stated in this form:

In all cases where the death of a human being results from a crime, or from criminal or other negligence, a right of action to recover damages for the homicide shall exist as herein prescribed.

1. A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent.

If suit be brought by the widow, and she should die pending the action, the action shall survive to the children. If suit should be brought by the children, and one of them dies pending the action, the action shall survive to the surviving child or children.

The amount which may be recovered by the widow shall be held by her subject to the law of descents, as if it had been personal property descending to the widow and children from the deceased.

The amount recovered for the homicide, whether the recovery be had by the widow or the children, shall not be subject to any debt or liability of the deceased husband or parent.

2. The husband may recover for the homicide of his wife.

If the wife leaves a child or children surviving, the husband and children shall sue jointly, and not separately, with the right of survivorship as to the suit, if either die pending the action.

3. A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, upon whom she or he is dependent and who contributes to her or his support, unless said child leaves a wife, husband or child.

4. In all actions herein authorized, the plaintiff may recover the

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full value of the life of the deceased, as shown by the evidence, without deduction for necessary or other personal expenses of the deceased had he or she lived.

359. Statute construed strictly.

This statute has always been so construed as not to extend the right by implication to others than those named. At common law the death of a human being could not be complained of as injury in a civil court.

In *Wynn*, 42/331, the remedy was denied to the husband for the homicide of his wife, because he did not have it by common law, and it was not given to him by statute at that date. Cited, 70/683.

The same ruling was made in *Womack*, 80/132, but it was held that if the wife had lived any length of time after the injury, the husband might have recovered for the loss of her services during that time, and for any expense he might have incurred in her treatment.

A mother could not recover for the homicide of her minor son. *Chick*, 57/356. Nor a father for the homicide of his minor daughter. *McDonald*, 60/320. Nor could a legal representative recover at a time when such right was not given by the statute. *Miller*, 55/143.

Under the word "parent" it was held that minor children could recover for the homicide of the mother. *Venable*, 65/55. But not when the father was living. *Scott*, 77/450.

In *Mott*, 70/680, the right of action was denied to an adult son because the statute was construed to embrace only such children as were entitled to a support from the deceased. Cited, 75/780. Nor has a child the right to recover for the homicide of its stepfather. *Marshall*, 103/725.

The right to institute an action for the homicide of a father is, under the Code, § 4424 (3828) where there is no widow, vested in the minor children of the deceased. An adult child has no right to institute such a suit. *Mott*, 70/680; *Hyer*, 113/420. Accordingly, when a suit for the homicide of a father was brought by three plaintiffs, alleging themselves to be children of the deceased, and two were adults and one a minor, a demurrer raising the objection that the adults were improperly joined as plaintiffs should have been sustained. *Harris, et al.*, 128/394.

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The mother of an illegitimate child has no right of action, under the Code, § 4424 (3828) for his homicide. Robinson, 117/168.

In a petition in which the plaintiff is alleged to be a named person, a minor, who sues by another named person as his guardian, it is not necessary to allege when the guardian was appointed, or from what court he received his appointment. Such an allegation is sufficient to establish a prima facie right to institute the suit. Any objection to the competency of the guardian to institute the suit must be raised by a plea in abatement. Harris, *et al.*, 128/394.

360. Construction of former acts.

Prior to the Act of 1887 it was the settled construction that this law applied to all natural or artificial persons, when the homicide was the result of intention or criminal negligence, and that the term "homicide" in the statute meant a case of felonious intent in the killing or such criminal negligence as constituted an ingredient in the offense of involuntary manslaughter. Cottingham *v.* Weeks, 56/201; Daly *v.* Stoddard, 66/145; McDonald *v.* The Eagle & Phenix Mfg. Co., 68/839; Roach, 70/434; Rankin *v.* Merchants & Miners Trans. Co., 73/230; Allen *v.* Augusta Factory, 82/76.

361. Degree of mental conviction required.

In a civil action against the master for damages for a willful or reckless homicide committed by his servant, it is not requisite that any element of the case should be established with such certainty as to leave no reasonable doubt upon the minds of the jury. Barnett, 94/447.

362. The killing must have been wrongful.

This is an action sounding in tort, and not an action ex contractu, but in determining whether the railroad company is liable, the relation of the deceased to the railroad, whether as an employee, or passenger, or stranger, are essential elements in deciding whether the killing was wrongful. The right to sue depends upon the wrongfulness of the killing, and if the killing occurred under such circumstances as by the laws of the place of the killing, or by a legal contract between the parties, the railroad company was not guilty of any breach of duty to the deceased, the right of

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action does not accrue. It must appear that the killing was wrongful, that is, that the defendant in such killing was guilty of a breach of duty, express or implied, which was due to the deceased, and if there was no such breach there can be no recovery. *Strong*, 52/461. Cited, 70/439; 72/139; 111/589.

For the unlawful, willful homicide of a husband, whether it be murder or only voluntary manslaughter, his widow may recover damages. If committed in resisting a battery, and the deceased was the assailant, these facts, with the attendant circumstances, will go in mitigation of the amount. *Weeks v. Cottingham*, 58/559.

As a general rule, evidence of threats previously made by one who is killed by another, but uncommunicated to the latter, are not admissible on the trial of a case involving the question whether or not the slayer was justified in taking the life of the deceased; but when the evidence tends to show that the person killed began the mortal conflict and that the slayer killed his adversary in self-defense, proof of threats of this character may be received to show the state of mind or feeling on the part of the deceased, and thus illustrate his conduct and throw light upon his intention and purpose at the time of the fatal rencontre. *May v. State*, 90/797, and cases therein cited and reviewed. *McKinney v. Carmack*, 119/467.

363. Conduct of deceased enters into the case as if he was the plaintiff.

An action brought to recover damages for a homicide can only be maintained when the circumstances are such that they would have entitled the deceased to have sued, had the injury stopped short of killing him. The nature of his conduct enters as much into the case as if he himself was the plaintiff, and consequently if he was culpable, the damages in case of a passenger or stranger, if any, should not be as large as if he had been free from fault. *Kinney*, 28/111. Cited, 70/222.

A widow may recover for the homicide of her husband; she will have a right of action whenever the husband, had he lived, would have had such right, and whatever would have been a good defense to his suit had he lived will be equally available against one brought by her. If the husband, by ordinary care, would have avoided the consequences to himself, even when caused by defendant's negligence, he would not have been entitled to recover. The conduct of the deceased in this case evinced a total want of that care which

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a man of common sense would take of himself, and is nothing short of gross negligence. He voluntarily got drunk—placed himself in a situation of peril, without the intervention of the railroad company, fell over an embankment into one of their cuts and was killed. Under these facts, the railroad was not liable, and a nonsuit was right. *Berry*, 72/137. Cited, 74/613; 84/785; 108/508; 111/589; 3 G. A. 176.

The principle which allows a defendant, when sued by the widow for the homicide of her husband, to set up any defense which would have prevented or lessened the husband's recovery, had he not died, was very clearly recognized in *Johnson*, 38/409; *Ayers*, 53/12. In both of those cases it was held, not only that the contributory negligence of the husband would reduce the amount of the recovery the wife might have been entitled to had he not been negligent, but if the husband could have avoided the consequences to himself, caused by the negligence of the defendant, by the exercise of ordinary diligence on his part, there was no right to any recovery. *Hendricks*, 52/467. Cited, 60/668; 71/441; 101/221; 111/589.

The suit *Pittman*, 73/325, was brought by a widow against the Georgia Railroad to recover damages for the homicide of her husband. The deceased was employed by the W. & A. Railroad to look after freight delivered to the Georgia Railroad, and to take down a memorandum of the numbers and seals of the cars. The numbers were somewhat high on the sides of the cars, and the ground was slightly depressed between the tracks, there being several tracks running about that point. They were about four feet apart. It was common to step back on another track, if vacant, get the numbers of the cars, and then go up and examine the seals. While doing this deceased was run over by the defendant's train and killed. The engine that caused the injury was engaged in shifting cars. It went up one track and came backing down another at a speed of about two and one-half or three miles an hour. When it had gone about fifteen or twenty feet the fireman looked over the tender and saw deceased making entries in his book and standing on the track with his back partly turned towards the engine, at a distance of about two and one-half car lengths. The fireman shouted, "Look out," two or three times, and seeing that it did not seem to draw deceased's attention, stepped back and pulled the bell-rope, ringing the bell. He then went to the other side of the engine to see if deceased had left the track, and not seeing him, returned

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to his position and found that he had been hurt. The engineer did not slacken the speed of the engine when the fireman hallooed and rang the bell, but any one would have had time to leave the track after the bell rang, if he had paid attention to it. There were steam-brakes on the engine by which it could have been stopped in five or six feet at the speed at which it was running. There was a conductor whose duty it was to make up the train. He was not with the engine at the time of the injury, but gave instructions to the train-hand as was very often done. One of defendant's witnesses testified that he was engaged on behalf of the Georgia Railroad in the same position as deceased for the other road, and was at work with him just before the accident; that deceased was drunk and he urged him to come out from between the tracks, and took hold of his arm and tried to urge him out, but deceased pulled away saying that he could take care of himself. The evidence as to deceased's being drunk was conflicting. The doctrine of contributory negligence was applied, and there was a recovery by the plaintiff. Jackson, C. J., said: "The verdict is supported by sufficient evidence to uphold it, supported as it is by the presiding judge. The conductor was absent and unaccounted for. The engineer failed to stop the train when the fireman cried out, "Look out," and jerked the bell. The brakeman did not tell him a man was on the track, a car length or two before the car which was backing upon him, and thus he was negligent of human life. The agent and servant of the railroad left deceased, who was killed soon after, drunk, as he thought, without warning the engineer that he was in danger, though he did warn deceased. If drunk, he should have been the more diligent in letting the engineer know of his being in danger; if sober, he should have told that he was there, and in danger. More especially was this his duty, as he was helping the deceased in business in which both were engaged, the servants of their respective companies. Therefore the presumption of negligence, so far from being rebutted, was strengthened by the evidence. That there was contributory negligence on the part of deceased appears. Yet he was on duty and in the line of his employment by the railroad, and on the track where he should have been, and there is nothing going to show that he saw or knew of the approach of the train. The strongest circumstances against him is the effort that the servant of the Georgia Railroad made, according to his testimony, to get him away, and the warning he gave that the train

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would come back on that track; but it was for the jury to scrutinize his testimony, and give it the credit they thought it entitled to, and his testimony about the drunkenness of the deceased really is subject to doubt, and contradicted by other witnesses, and casts a shadow on all he said on the stand." Cited, 89/278. In Smith, 82/805, in considering the subject of the injured person's failure to shun the consequences of the other's negligence, Bleckley, C. J., says: "In all the cases cited there were complicated facts, or else some explanation either furnished or suggested by the evidence which might serve to account in whole or in part for the apparent failure by the party injured to protect himself—something from which the jury might by probability infer that the attention was naturally and justifiably withdrawn for the moment from the danger or the cause of danger. The case of Pittman was one in which the injured person was engaged in the performance of duties as an employee, duties calculated more or less to divert his attention from the cause of danger." Cited, 3 G. A. 274.

In Kinney, 28/111, the suit was brought to recover damages for the killing of the plaintiff's son, a minor, while a passenger on the cars. The car ran off the track and that was *prima facie* evidence of negligence in some of the persons connected with the road. The minor was on the platform; he was told by the conductor that it was a place of danger, that he was violating a rule of the road, and that he must come inside the car. That he disregarded and was killed; whilst another young man who was with him heeded it, went inside the car, and escaped unhurt. As his legal representative was only entitled to sue if the circumstances were such that they would have entitled him to sue had the injury stopped short of killing him, the nature of his conduct entered as much into the case as if he himself had been the party plaintiff and it was held that the damages should not be as large as if he had been free from fault. This decision was rendered prior to the adoption of the Code.

In Rock, 133/120, Mrs. Rock sued to recover damages for the death of her husband. Rock was a telegraph operator in the employment of the defendant and he was killed in a collision. Fish, C. J., said: "It seems plain from this testimony of the plaintiff's own witnesses, that the work train upon which Rock, plaintiff's husband, was riding when he met his death, would not have started on its fatal run from Belt Junction to Mina, if Rock had not perpetrated a fraud upon the train dispatcher, by signing the conductor's

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name to the 'hold' or waiting order and wiring the signature to the train dispatcher. It seems clear that but for Rock's gross and culpable misconduct there would have been no collision, and consequent loss of life; * * * For though, under Gorman's testimony, New, the engineer of No. 22, was negligent and without such negligence the collision could not have occurred, still it is also equally clear that but for the gross misconduct of Rock there would have been no collision and he would not have lost his life. Rock's misconduct was as much the proximate cause of the catastrophe as the negligence of New, if such negligence there was. Rock may be said to have intentionally and deliberately, and apparently to suit his own convenience merely, started No. 508 on its fatal run to Mina at a time when it was his duty to hold it at Belt Junction to await the further order of the train dispatcher; and to have thereby caused the collision which resulted in his death. He deliberately and wrongfully set in motion an agency without the existence of which there would have been no collision. If he had survived his injuries, could he have recovered from the defendants for the consequences to himself of his own intentional misconduct? We think not. As he could not have recovered, if his injuries had been less than fatal, his widow can not lawfully recover for his death."

Assuming that the negligence of the defendant was shown, there was no error in granting a nonsuit; for the evidence required a finding that the deceased was not exercising that degree of care which the law requires of even a youth of his years and experience, under the circumstances existing at the time of the collision which resulted in his death. Rowe, 115/929.

364. The widow's right vests at the death of husband.

The right to sue for the homicide of the husband vests in the widow at the death of her husband, and is not divested by the subsequent marriage of the widow, nor will a subsequent marriage change the measure of damages to which she was entitled when her right of action accrued. Garr, 57/277. Cited, 67/700. Nor will the fact that he and she were living in a state of separation at the time of his death change the measure of damages. Bond, 111/13. Nor should the amount be reduced by any insurance on his life received by her. Meigs, 74/857.

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365. Number of children, that widow worked in the field, and more prosperous condition of the family, immaterial.

In *Rouse*, 77/393, 80/442, it was held that in a suit by a wife for the homicide of her husband, the number of minor children is not in issue, nor is their support. Cited, 85/528; 82/590. And the fact that the widow worked in the field for a livelihood after his death is immaterial and irrelevant to the issue on trial, and should not therefore go to the jury as evidence. *Moore*, 61/151. In the trial of an action by a widow for the homicide of her husband while confined in a chain-gang, it was not error to reject evidence offered by the defendant to the effect "that the plaintiff was, to all appearances, as well or better provided for now than before deceased went to the chain-gang; that she and her children were then constantly in rags, and in destitute condition; that deceased, before he went to defendant's chain-gang, was constantly in criminal scrapes, often in jail under other criminal charges, and, when out, was at work to defray expenses of defending himself against such charges." *Simmons*, C. J., said: "We think this testimony was properly excluded. The plaintiff was entitled to recover the gross value of her husband's life, without regard to whether she had previously received anything from him or not, and without regard to what his personal expenses may have been. The more prosperous condition of his family after his death was clearly irrelevant." *Boswell v. Barnhart*, 96/521. Cited, 102/161; 111/15.

In an action instituted by a widow for the homicide of her husband, caused by the negligent operation of a train of cars by a railroad company, evidence going to show that the deceased, at the time he was killed, left no estate or property was inadmissible. *Wiggins*, 113/842.

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366. Negligence of the deceased.

In *Seats*, 86/811, it was held that under the plain provisions of our statutes, a widow can not recover damages from a railroad company for the killing of her husband when it appears that, by ordinary care, he could have avoided the killing, and that his death was caused by his own negligence.

It plainly appearing from the evidence that the plaintiff's hus-

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band met his death because of a total disregard of his own safety, and that, by the exercise of even slight care, he might have avoided the catastrophe which resulted in his death, the judgment of non-suit was right. *Lee*, 97/311; *Sawyer*, 112/346.

In *Johnson*, 60/667, a widow sued for the death of her husband. He, at the time he was killed, was lying upon the railroad-track where it was crossed by a public road. He could, by the exercising of ordinary care, have avoided the defendant's negligence, assuming that the defendant was negligent in not blowing its whistle at the proper time at the crossing of the public road and checking up the train, and consequently a verdict in his favor was contrary to law. Cited, 64/479; 70/229; 71/440; 71/139; 74/612; 101/221.

One knowingly and needlessly walking at night upon a railroad-track can, by the use of ordinary diligence, avoid being run over by a train, unless it appears that owing to some special fact or circumstance, the use of such diligence would prove ineffectual. *Wilds*, 82/667. Cited, 102/290; 3 G. A. 274.

This suit having been brought for the recovery of damages alleged to have been sustained in consequence of the homicide of the plaintiff's husband, and it appearing that at the time of the infliction of the injuries by the running of the defendant company's locomotive, which resulted in his death, the deceased, at night, was a trespasser on the track of the company, not at a public crossing nor at a point at which those in charge of the locomotive had reason to apprehend the presence of any person on the track, and there being no allegation showing that the injuries were wilfully or wantonly inflicted by the defendant's servants, and it appearing from the entire petition that the deceased was killed in consequence of his own gross negligence, no cause of action was set forth, and a general demurrer to the petition should have been sustained. *Riley*, 127/567.

The only duty which a railroad company owes to a trespasser on its right of way is to observe ordinary diligence to avoid injuring him after his presence thereon becomes known to the employees in charge of the train. Consequently, in a suit by a widow for the homicide of her husband, where it appeared, from the undisputed evidence, that the deceased was a trespasser; that he went upon the railroad track in an intoxicated condition; that shortly thereafter his dead body was found near the track, wounded in such a manner as to indicate that he had been struck by a passing train while lying

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down on or near the track and that the employees of the defendant in charge of the train which was supposed to have struck him never at any time saw him on the track or right of way, and did not learn until a considerable time afterwards that he had been killed, it was not error to direct a verdict for the defendant. Hall, 123/213. Cited, 124/1035; 128/562; 3 G. A. 271.

The plaintiff brought suit against the defendant for the homicide of her husband, which occurred from his being struck by a freight-train of the defendant while crossing the railroad tracks at a public street crossing in the city of Madison. A verdict was rendered in favor of the plaintiff, a motion for a new trial was overruled, and the defendant excepted. This court held, on the evidence as then presented, that it disclosed that the plaintiff's husband, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence; and reversed the judgment. 112/346, *supra*. On the second trial the evidence for the plaintiff differed in material respects from that on the former trial. It tended to show that the train which caused the injury was not on schedule time, but more than an hour late, so that there was no reason on the part of the deceased to anticipate its coming; that there were freight-cars standing on the side-track on the side of the railroad which the deceased approached, and within a few feet of the main line, in such position that, together with the depot building and another building not far away, they would obstruct the view of the railroad track by the deceased until he passed the end of the freight-cars on the side-track and was near the main line; that the train was running about thirty miles an hour, in violation of an ordinance of the city limiting the speed of railroad trains, crossing the public street where the injury occurred, to six miles an hour. The jury found a second verdict for the plaintiff. A motion for a new trial was made, and the judge (other than the one who presided at the trial) again set aside the verdict, holding that the evidence was substantially the same as when the case was passed on by the Supreme Court. Held, that this was error. The evidence on the second trial was materially different from that on the former trial, and the second verdict should have been allowed to stand. Sawyer, 123/251.

In Daniel, 119/246, it was held that under the evidence for the plaintiff, her husband, for whose homicide she sued, could by the exercise of the skill and diligence to protect himself required by law, have avoided the injuries which caused his death. A judg-

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ment of nonsuit was therefore proper. Candler, J., said: "It appears that the deceased was digging under an embankment, and that those in charge of the work sent men to the top of the embankment to drive wedges in the earth to prize it loose. This, however, was done in full view of the deceased, and all that was necessary for him to ascertain that the wedges were being driven was for him to 'look up and see them.' A witness for the plaintiff, who was working within three feet of the deceased, testified that he knew at the time that the wedges were being driven; that the object in driving them was to make the dirt cave in, and that the men went up on the embankment for that purpose. He further testified that the deceased had an equal opportunity with himself of knowing these facts; that both of them were present when the men were ordered to drive the wedges, and that the order was given in a tone loud enough for the deceased to hear it. * * * The plaintiff's husband assumed the ordinary risks of his employment, and was bound to exercise his own skill and diligence to protect himself. The deceased was chargeable with knowledge of the physical fact that in undermining dirt, when the support is removed, the dirt will either topple over or cave in. At the time of the injuries which caused his death he was digging under an embankment, while others, in plain view of him, were driving in wedges to force away the overhanging earth. The plaintiff's own evidence, in our opinion, clearly demonstrates that the deceased, had he used the skill and diligence required of him by law to protect himself, could have avoided the injuries which caused his death; and the grant of a nonsuit was therefore proper."

367. Killed at a place that was used by the public as a passway.

In Dowdy, 88/726, it appeared that the husband of the plaintiff was run over and killed by one of defendant's engines. It was in daylight, at a place that had been used by the public as a passway for thirty years. He stepped upon the track, and walked upon it about thirty feet before the engine struck him. It was held that the evidence showing that the plaintiff's husband could, by the exercise of ordinary care, have avoided being killed by the engine, she is not entitled to recover for his homicide, even though the defendant's engineer may have been in some degree negligent, and the court did not err in granting a nonsuit. Bleckley, C. J., dissenting.

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In *White*, 83/595, the plaintiff sued for damages for the homicide of her husband. He was killed by a passenger-train, while walking along the track of defendant's railroad. The train was ten or fifteen minutes behind its schedule time; it had passed beyond the corporate limits of Atlanta and of West End, and was running at the rate of twenty-five to thirty miles an hour; White was walking upon the railroad-track, going in the same direction the train was going; there was a public road alongside the track, on which he could have walked; the engineer could have seen him some four hundred yards; the danger-signal was given, exactly at what time before the killing does not appear; there were two colored girls on the track also, between the engine and White, who heard the train and left the track, and hallooed at White that the train was coming, but he failed to leave the track, and was run over and killed. The trial judge granted a nonsuit. *Simmons, J.*, said: "It is quite apparent to us, and doubtless would have been to the jury if the case had been submitted to them, that White could have avoided this injury to himself by the exercise of ordinary care, and that it was gross negligence on his part to walk along this track as he did, giving no heed to the signals given by the train, or warning given him by the girls. Nor is this view of the law changed by the fact that it had been the custom for White and other people to walk along this track, or by the fact that the train was behind the schedule time. It does not follow from the fact that people use the track in this way, which use is known to, and thereby licensed by the company, that the company is bound to the exercise of extraordinary care and diligence to protect persons thus using the same. If the use of the track by pedestrians, with the knowledge of the company, amounts to a license at all, it must be on the condition that persons so using the same shall exercise ordinary diligence themselves, so as to avoid being injured by the company's trains. In all such cases as this, if it appears from the evidence submitted by the plaintiff that the person injured did not exercise ordinary diligence to avoid the consequences of the company's negligence, and that he could have avoided it by the exercise of such diligence, the plaintiff is not entitled to recover, and a nonsuit is proper." Cited, 92/93; 95/362.

In *McIver*, 108/306, the plaintiff sued for the death of her husband, and from the evidence it appears that, in the evening, after dark, *McIver* was walking along the defendant's track in the town of Cordele, near the corporate limits, and going southward in the direc-

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tion of his home, which was in the main part of the town, when a regular passenger-train, due there at or about that time, struck him from behind and killed him. This part of the track was in constant use by the public as a pathway, and, at a point variously estimated at from forty to a hundred and ten feet north of where the train struck the deceased, was crossed by a road which was much used, but which, according to some of the evidence, had not been established as a public road; and north of this crossing was another, near which was a blow-post; but the whistle of the locomotive was not blown at the blow-post, nor at any point between it and where the collision occurred. The blow-post was within the corporate limits of the town, and the blowing of locomotive whistles within these limits was prohibited by a municipal ordinance. There was evidence that the train was running at the rate of about forty miles an hour, and without a headlight, and that the bell on the locomotive was not rung nor the speed of the train checked before the deceased was struck; but as to these matters the evidence was conflicting. It was ruled that, apparently, the preponderance of the evidence in this case required a finding that the defendant was not guilty of any negligence; but even upon the contrary assumption, the verdict in the plaintiff's favor was not warranted, for it plainly and affirmatively appeared that the person for whose homicide the action was brought could by the exercise of ordinary diligence have avoided the collision by which his death was occasioned. Though very deaf, and though he had been specially warned of the danger to which, on account of his infirmity in this respect, he exposed himself in going upon the track of a railway company, he voluntarily went upon the defendant's track at a time when he must have known that a train was approaching; and the undisputed facts point irresistibly to the conclusion that he neglected to take any precaution whatever for his safety. That the place on the track where he was killed was constantly used by the public as a pathway furnished no excuse for the failure of the deceased to exercise that degree of care which the law requires of all persons in such a situation and under like circumstances. Cited, 113/1046; 119/99.

Where a very deaf man voluntarily walked upon the track of a railroad company at a time when a regular passenger-train was due, and was killed by the train, he failed to exercise ordinary diligence to avoid the collision by which his death was occasioned. That part of the track where he was killed was constantly used by the public as

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a pathway furnished no excuse for the failure of the deceased to exercise that degree of care which the law requires of all persons in such a situation and under like circumstances. *McIver, supra*. It follows that the trial judge properly sustained the demurrer to the petition, from which it appeared that the plaintiff's deceased husband had been killed under the circumstances above indicated. *Roach, 119/98*.

368. Deceased went with a small boy upon a trestle and was killed.

In *Leach, 91/419*, the plaintiff sued for the homicide of her husband, and it was held that where a person who was killed because of his own gross negligence not only exposed himself by going upon a high trestle over which the railroad-track passed, but incumbered himself with a small boy, exposing him also, if such person could have saved himself after discovering his danger from an approaching train, had he not been so incumbered, and his care for the boy was the chief reason why he did not succeed in protecting himself, he was nevertheless chargeable with ordinary care for his own safety, irrespective of the presence of the boy. The case stands as if he (the deceased) had been upon the trestle alone, since it can not be an excuse for him, as against the railroad company, that he neglected his own safety to preserve the boy, with the care of whom he had voluntarily incumbered himself. *Lumpkin, J.*, said: "Whatever may be the law with reference to the liability of a railroad company for injuring or killing one who exposes himself to risk and danger by attempting to rescue another in a perilous situation which he had nothing to do with bringing about, certainly when one directly and by his own negligence causes the peril to exist, and because of it exposes himself to danger, he has, as against the company, no excuse for so doing. If so, it would be, in a certain sense, allowing him to take advantage of his own wrong. Under the facts of this case, the plaintiff was not entitled to recover. Her husband's death was due to his own utter want of care and prudence in going there incumbered with the boy, and in failing to take the requisite steps to save himself after the danger from the train became imminent, and opportunity to escape was still at hand." Cited, *93/390; 112/36; 131/161*.

In *May, 80/363*, it was held as follows: The action being for the

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negligent killing of the plaintiff's husband by running a locomotive against him and throwing him from the track, while he was passing over or along a trestle forming part of defendant's railway, and the evidence for the plaintiff bearing on the question of negligence being that, as soon as the train, which was a fast mail, rounded a curve so as to command a view of the trestle, which was somewhat less than one-fourth of a mile distant, the whistle was blown and the air-brakes applied, but it was impossible to stop the train in so short a distance; that from the curve to the trestle, and for two or three hundred yards beyond, the track was straight; that upon a straight track a man can be seen at a long distance, but not so as to tell whether he is on the trestle or another part of the track, though at a short distance this is easy to distinguish; that the trestle was eight or ten feet high, a clear stream eight or ten feet wide and four or five feet deep beneath it, and where no water a sand-bed, soft sand, a safe place to jump, but in some parts overgrown with briars, and some cane coming up through the sand; that for people to cross this trestle was an every-day practice, but not when trains were coming; that the deceased was acquainted with the neighborhood, in the habit of being at a village near the trestle, and probably knew the railroad schedule; that the train was behind time—one witness said very little, another that it might have been an hour or half an hour; that the speed was at the rate of forty miles, when the schedule rate was thirty-six miles per hour; and that deceased was a young and healthy laboring man; held, that there was no error in granting a nonsuit. Any fair and reasonable construction of the evidence makes it more clear that the deceased was grossly negligent than that the defendant was negligent at all. It would be impossible for the jury rightly to infer both that there was negligence by the defendant, and that the deceased could not have avoided the consequences thereof by the exercise of ordinary diligence; and hence any recovery by the plaintiff is not within the range of legal possibility. Cited, 83/597; 131/161.

369. Presumption relied on and it was rebutted.

In *Adgate*, 108/781, it was ruled that the plaintiffs depended for a recovery exclusively upon a presumption of negligence raised by law against the defendant company. This presumption was fully rebutted by uncontradicted evidence, and the evidence as a whole showed that the homicide for which the action was brought resulted

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either from the failure of the decedent to exercise ordinary care and diligence, or from an accident the nature of which is not clearly disclosed. Under these circumstances, there could be no lawful verdict for the plaintiffs, and the court did not err in directing the jury to find for the defendant.

370. Presumption not rebutted.

In *Strom*, 108/758, it was held that as the evidence authorized a finding that the deceased was killed by the running and operation of the defendant's train of cars, a presumption of negligence on the part of the railroad company arose under the statute, and it was therefore, on the trial of an action brought to recover damages for the homicide, erroneous to grant a nonsuit, there being no evidence showing that the deceased failed to exercise the proper diligence, or to rebut the legal presumption against the defendant.

There being evidence to warrant the jury in finding that the homicide, for which the plaintiffs were legally entitled to sue, was caused by the running of the defendant's train, this evidence, in connection with the legal presumption of negligence against the company imposed by § 2780 (2321) of the Code, was sufficient to carry the case to the jury, unless that presumption was fully rebutted by other evidence. The defendant having introduced no evidence at all, and it not appearing from the evidence for the plaintiffs that this presumption was in all respects completely rebutted, it was error to grant a nonsuit. *Gammage*, 97/62.

371. Where company employs an insane agent.

In an action brought to recover damages for the homicide of the plaintiff's husband by an agent of the company and it was alleged that he was subject to disease and aberration of mind, and that the company employed him knowing that fact, it was held that while, as a general rule, any mental disease or infirmity which would excuse the agent from criminal responsibility would also excuse the company from civil responsibility, this would not be available if the company employed the agent, and assigned him to duty, with knowledge of his insane condition, or of his being subject to sudden fits of insanity. Their employment of an improper person to come in contact with the public as their agent would be gross misconduct. *Christian*, 79/460. Cited, 86/314; 113/1108; 128/562.

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372. The company is liable whether its agents causing the injury are engaged in running trains or not.

Section 2780 (2321) of the Code renders railroad companies liable for damages done by any person in their employment and service unless their agents have exercised all ordinary care and diligence, whether such persons are engaged in running trains, etc., or not. And therefore, a railroad company is liable in damages for the wrongful homicide of its customer, committed by its depot-agent in his office, whilst the customer was lawfully there or the transaction of business with such agent appertaining to his agency. But if, while so engaged, upon account of some private feud previously existing or suddenly arising, wholly disconnected with his duties as such employee, and not pertaining to the business then in process of transaction (the company then not owing to the other person the duty of personal protection), as in the case of a passenger before the completion of his journey, he commit injury upon the person of another, the company would not be liable. The turning-point in the present case being whether the agent of the company wrongfully slew the husband of the plaintiff, and, if so, whether it was done while he was engaged in the transaction of the company's business, in the line of his duty, because of differences arising in the settlement thereof, or whether he committed the homicide because of a personal grievance wholly disconnected with the business then in hand, it was error for the court to charge generally, and without qualification, as follows: "If you believe from the testimony that Dixon was not justifiable in taking the life of Christian, then I charge you that the plaintiff would be entitled to recover for whatever damages the evidence shows she has sustained by reason of the death of her husband." If the homicide be wrongful, whether the offense be properly classed as manslaughter or murder would not be material; but, if the agent was justified in its commission, no liability would arise against the company, whether the act was committed by him while engaged in the business of the company, in the line of his duty or otherwise. Christian, 79/460; 86/314; 97/56. Cited, 101/35.

373. Questions for the jury.

In a suit by a widow for the homicide of her husband by a railroad, the question of the defendant's negligence, or whether the de-

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ceased could have avoided the consequences to himself of defendant's negligence by the use of ordinary diligence, or how far the deceased contributed to the injury by his own neglect, are questions alone for the jury. *Lavier*, 71/222; 73/794; 75/611.

In this case two verdicts, for the same amount and based on the same facts, were rendered. The presiding judge granted a second new trial on the ground that the verdict was excessive. It was held that that was error; that questions of contributory negligence are matters for the jury, and after two verdicts for the same amount and based upon the same facts, the judge should not have interfered with the finding, there being enough evidence to justify it, and no error of law complained of in the rulings of the court on the trial. *Cleveland*, 73/793. Cited, 125/807.

In *Ramsey*, 110/266, it was held that whether the husband of the plaintiff was killed on the street-crossing or on the track of the railroad away from the crossing were questions of fact, as were also the questions of negligence on the part of the defendant, and whether the deceased could have avoided the negligence of the defendant by the exercise of ordinary care. There was evidence which authorized the jury to find that the defendant was negligent in the operation of the train, and that the deceased was struck and killed at a public street-crossing; and therefore the rule which governs the liability of a railroad company to a trespasser on its track is not necessarily involved, as the jury might have legally returned a verdict against the defendant on the other theory in the case. A new trial was properly refused.

Where, in an action for damages on account of personal injuries, the case turned upon the question of whether the deceased by the exercise of ordinary care could have avoided the injury, and the evidence did not show such conduct upon the part of the deceased as to amount to negligence per se, the question was one of fact for the jury; and in such case, after two concurrent verdicts for the plaintiff on the same state of facts, and where under all of the evidence the verdict is not manifestly wrong, the trial judge should not, in the exercise of his discretion, grant a second new trial. *Dethrage v. City of Rome*, 125/802.

ACTIONS BY WIDOWS OF EMPLOYEES OF THE COMPANY.

374. What must be shown to authorize a recovery.

In a suit by a widow against a railroad company for the homicide

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of her husband, who was an engineer in its employment, two things are necessary to a recovery: First, absence of negligence on his part contributing to the occasion or cause of his death; and, second, negligence on the part of the company or some other agent or employee. When it is shown that the deceased was without fault, the presumption of negligence on the part of the road arises. It may, however, be rebutted by proof. If neither the company nor the employees were negligent, there can be no recovery. Jackson, J., says: "It is for the jury to say on the whole case made by all the proof that plaintiff's husband is without fault, and that the company is at fault; and they must say that both things are true before the plaintiff can recover." Roach, 64/635. Cited, 83/674. See this case again, 70/434.

It was not error to charge that the burden was on the plaintiff to show that her husband was without fault or that the defendant was in fault. Prather, 80/427; Jones, 116/27, 284.

In Maloy, 77/238, it was held that "the doctrine of contributory negligence does not apply in the case of an injury sustained by an employee. He must be free from fault; and, if the injury is sustained by him in consequence of any fault or negligence on his part, he can not recover, and in this case, the employee being dead, and the suit being by the parent to recover damages for the killing of a minor son, she can not recover unless if he were in life he could recover. She stands in no better condition than the deceased would have stood in had he not been killed and was present before the court." Cited, 111/589.

In Smith, 97/777, Callaway, J., says: "It is well-established law in this State that, in order to recover damages from a railroad company for the homicide of an employee, it must be shown that the employee was without fault or negligence, and that he did nothing to contribute to the homicide and neglected to do nothing to prevent the consequences of the negligence of others."

Marsh, an employee of the company, was run over and killed by a train while he was engaged in uncoupling the cars. His wife sued the company for the homicide, and it was ruled that to make a railroad company responsible for the homicide of an employee by the negligence of coemployees, it is essential that the deceased should have been free from fault himself; and when the evidence for the plaintiff shows clearly that he was not, there can be no recovery, and a judgment of nonsuit should be affirmed. Bleckley, J., said:

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"Whatever created the danger, it was as visible to him then as it could now possibly be made to the jury. He saw that the train did not stop for him to uncouple; and he nevertheless rushed in and tried to uncouple when the cars were in rapid motion; the evidence makes a case of contributory negligence; and any negligence whatever by the deceased employee bars recovery." Marsh, 56/274. Cited, 63/183.

In Nash, 81/580, the plaintiff sued to recover damages for the homicide of her husband, and Simmons, J., said: "It is alleged as error that the court permitted the plaintiff, after she had announced her testimony closed, and after the defendant had introduced all of its evidence, to introduce the testimony of several witnesses, all of said testimony being in support of the main case made by the plaintiff on the first examination of witnesses, and not in any sense in rebuttal of the evidence of the defendant. Under the decisions of this court, an employee who sues a railroad company for injuries, after proving the injury, can recover on proof of either of two facts: After proving the injury, if he proves that he was free from negligence, he can recover; or if, after he proves the injury, he proves that the servants or agents of the company were negligent, he can recover. If he proves that he was not negligent, the law then presumes that the company was negligent, and the burden is shifted upon the company to show that it was not negligent, or to show that the plaintiff was negligent. Proof of either of these facts by the company will prevent a recovery by the plaintiff. In this case, the plaintiff proved the death of her husband, and that he was not negligent, and relied upon that proof for her recovery. The defendant replied by its evidence, but did not attempt to show that the plaintiff's husband was in any way negligent when he was killed, and rested its defense upon the ground that it was not negligent. We think that in this kind of a case the plaintiff had a right to reply to the defendant's testimony, and to show that it was not true. The plaintiff would have been entitled to recover on the proof submitted in her opening evidence. The case was fully made out when she closed her testimony. She was not put on notice, by the plea of the defendant, what its defense was. When, therefore, the defendant did not attack the proof on which she relied to recover, but set up as its defense that it exercised due diligence, and was not negligent, she was entitled to reply to that theory of the case by additional testimony; and the court committed no error in allowing her to do so.

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Besides, it is always within the discretion of the court to allow additional testimony, and it has been so held by this court from its earliest decisions." Cited, 97/769; 3 G. A. 274, 346; 7 G. A. 156.

The plaintiff having clearly showed negligence on the part of the company, it was incumbent on the latter to show that the engineer was negligent. On this point the evidence was conflicting, and the jury having determined the issue in favor of the plaintiff, and the trial judge having approved their finding, this court will not control his discretion in refusing a new trial. Vining, 116/284.

An act of the servant within the scope of his duties, entirely harmless except in connection with certain physical conditions of danger caused by the antecedent negligence of the master of which the servant was ignorant when he performed the act, will not, as a matter of law, defeat his right to recover, although it may have contributed in some degree to his injury. *King Manufacturing Co. v. Walton*, 1 G. A. 403. Cited, 7 G. A. 711.

375. Employee failed to display a danger-signal.

In *Kitchens*, 83/83, it was held that an employee of a railroad company being himself at fault, and thus contributing to his death, his widow can not recover. And *Bleckley*, C. J., said: "The verdict was clearly contrary to law and evidence, inasmuch as the homicide resulted from the failure of the plaintiff's husband to observe a rule of the road requiring him to display a signal when at work under a car. According to the evidence, if this signal had been put out, there is every probability that the calamity would not have happened. Employees can not be permitted to violate the rules of the service in which they are engaged, and thereby create a cause of action in favor of themselves or their widows. Indirect suicide gives no title to post-mortem reward."

376. Engineer killed while running in violation of rules.

The first case arising under § 2782 (2323) was *Cannon*, 35/105. *Cannon* was an engineer and was killed in a collision of trains. He was running at a higher rate of speed than the rules of the road allowed. That rate of speed put him at a sharp curve, and if he had observed the rule as to speed, the collision would not have occurred at that place and might not have occurred at all; a quarter of a mile short of that place the trains might have been seen by

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those upon them in time to have prevented the accident, though still further on in that direction the collision might have been worse. It was ruled that his widow could not recover for his loss of life, if by his own fault he contributed to the accident that caused his death. Cited, 53/15; 55/482; 63/183; 76/531.

Where the undisputed evidence showed that an engineer of a railroad company violated its rules furnished for his government in respect to passing switches and turnouts, and in respect to the speed at which trains should be run, and the precautions to be used by engineers to prevent collisions, and that a collision was occasioned in whole, or at least in large part, from his negligence in this regard, and that such collision caused his death, a recovery by his widow against the railroad for his homicide was contrary to law and unsupported by the evidence, whether or not there was also negligence on the part of the company's employees on the other train with which the collision occurred. *Folks*, 76/527.

According to the undisputed facts, the plaintiff's husband was guilty of negligence in running his train in violation of the rules of the company, of which he had knowledge, and which he had agreed, upon entering its employment, to obey. For this reason, and because of errors committed by the court, there should be a new trial; and if, upon the next hearing, the evidence is substantially the same, there should be a verdict for the defendant. *Kane*, 92/187.

377. When contradictory signals are given to an engineer he should stop.

Where a locomotive-engineer is warned, by a signal of danger ahead, not to proceed with his train, and immediately thereafter another signal is given, which indicated that he might proceed with safety, but both signals are continuously displayed together, so as to leave it in doubt which signal should be regarded, it is negligence for the engineer to go on with his train; and if he does so, and a collision ensues, in which he loses his life, his widow can not recover from the company for his homicide, thus occasioned; the law being that if an employee is guilty of any negligence, contributing to an injury to himself, he can not recover, if the injury does not result in his death, or, if it does so result, that no right of action accrues to his widow. *Bleckley, C. J., dissenting. Devine*, 89/541.

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If there was negligence on the part of the railroad company in leaving a portion of its track in such condition as to render coupling cars unsafe at that point, yet, as it affirmatively appeared from the plaintiff's evidence, which was the only evidence showing how and when her husband was killed, that this negligence, if it existed, did not cause or contribute to his death, and the evidence as a whole showing that in all other respects the company was free from negligence, the verdict was unwarranted, and therefore contrary to law. Atkinson, J., dissenting. Esslinger, 95/734. This case again, 99/327.

378. Killed by being knocked from a car by a bridge.

The case Stirk, 79/495, was brought to recover for the homicide of the plaintiff's husband. A nonsuit was granted. Stirk was an employee of the railroad as a train-hand. At Smithville, while the cars were en route, a car belonging to the Green Line Company was introduced into the train. It was a different kind of car from those ordinarily used by the Central Railroad, and was higher. As the train was approaching Cuthbert, the conductor's line, which reached from the cab to the engine, became entangled, and Stirk was ordered to go forward and release it. He went forward as directed, and while on top of the Green Line car the car passed under a bridge, and he was knocked off by the bridge and killed. Bleckley, J., said: "Two questions are made by the evidence. The first is, was the company negligent in introducing into its train a car higher than the ordinary cars of the company? If its ordinary cars were ones upon the top of which the employees could stand without danger in passing under this railroad-bridge, and if the company introduced into its train a car higher than its ordinary cars, and gave no warning to its employees of the condition of such car, then the jury might infer that the company was negligent therein, because of the increased hazard and danger to its employees. Another question is whether or not the deceased could have avoided the consequences of the defendant's negligence, if there was any, by the use of ordinary diligence. These were questions for the jury. The evidence showed that at the time this man was killed several persons attached to the train were looking in his direction, and seemed to apprehend no danger to him, because they gave him no notice or warning; and it is not probable that he himself antici-

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pated danger. He had been accustomed to pass under the bridge daily and knew its height. It was error to grant a nonsuit."

In Day, 91/676, it was held that there being evidence tending to show that the plaintiff's husband, a brakeman employed upon one of defendant's freight-trains, was killed by being knocked from the top of a car by a low bridge over defendant's road, and there also being evidence from which the jury might have inferred negligence on the part of the railroad company in failing to keep in suitable order warnings of the approach of trains to the bridge, and it not appearing from the testimony introduced by the plaintiff that the deceased was himself guilty of any negligence, the motion for a nonsuit was properly overruled, and the court rightly submitted to the jury the determination of the questions of fact involved. In view of the evidence above stated, there was no error in refusing to charge the jury as follows: "In a suit against a railroad company by one of its servants for injuries sustained by alleged negligence of others of its servants in the performance of an act with which the servant was connected at the time of the injury, then the presumption of negligence was not against the company before the plaintiff proved that the servant was without fault;" such request being inapplicable to the case presented. Lumpkin, J., said: "Certainly, the request in question correctly states a well-known legal principle, but one which is not applicable to the facts of this case. That principle is that an employee who characterizes as negligent an act in the performance of which he, as well as others of the company's servants, was engaged, can not, without showing himself free from fault, successfully rely upon any presumption of negligence by the company as a basis of recovery. In other words, where two or more employees are engaged in the prosecution of a common enterprise, which results disastrously, the law will not do violence to reason and consistency by presuming one who may be injured thereby free from fault, and at the same time imputing negligence to his fellow servants, who were engaged with him in the performance of the very act of which he complains. It is manifest, however, that this rule has no applicability to the facts of the present case. The negligence complained of is that the company maintained a 'man-trap' over its line of road, and signally failed in its duty to provide proper warnings to those on its trains of approach thereto. This was a duty devolving solely upon the master, and was a matter with which the plaintiff's husband had no

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connection whatsoever. His sole duty was to perform service to the company in the capacity of brakeman. If the company negligently failed to keep in proper condition and repair its signals of danger, this was negligence, in which the plaintiff's husband took no part, and with which he could in no event be made chargeable. Had he been a servant of the company, whose duty it was to look after, and keep in repair, the telltales at this bridge, an entirely different case would be presented." Cited, 1 G. A. 93, 94.

379. When an engineer should jump from his engine in an emergency.

An engineer having jumped from his engine and been killed, and the question being whether or not he was without fault, the necessity for jumping, his ability to jump, and the safety with which he could do so, are all for the consideration of the jury, and it was error for the judge to charge that, "the fact that he jumped is proof that he thought jumping was the safest course." Jackson, J., says: "It is hardly reasonable to say that an old man of sixty years of age could safely jump when a young man of twenty might do so with ease and safety. Moreover, a passenger might be justifiable in jumping from a train, when an engineer would not be in abandoning his engine. The passenger has only himself to care for; the engineer has lives and property of others at stake. The first is unskilled in the running of cars and the imminence of the danger; the other should know from experience of the risk of collisions from the distance between trains in danger of colliding; and what would be no fault in the passenger might be grave error in the officer of the company. All these are matters for the jury to consider without let or hindrance or intimations from the bench. We do not rule that the engineer must never leave his engine; but he must be sure that an emergency is upon him—imminent and impending—before it can be said that he is without fault in doing so. In this case had he not left the engine he would now be alive." Roach, 64/635. Cited, 83/674.

Crosby, 74/737, was an action brought by the widow of an engineer who was killed in a collision of trains. Negligence was imputed to him in that he did not quit his engine in time to avoid injury to himself. It was held that the trial judge did not commit error in charging the jury to the effect, that if, in the emergency upon him, he believed and had reason to believe, that in sanding

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the track, or otherwise working the engine, he could prevent the collision and save life and it was necessary to that end that he remain at his post in this moment of danger, then the widow could recover, but if it was not so necessary, and he knew it, or ought to have known it, then she could not recover on this issue. And, in respect to avoiding an injury from the collision of a freight with a passenger train, by leaping from his engine, the engineer on the freight-train should remain at his post so long as his presence on the engine may be of use to prevent the catastrophe. Jackson, C. J., said: "In respect to the issue of avoiding the catastrophe by leaping from the engine to save his life, we all agree that at such a moment, in charge of such a train, in view of passenger-cars in his front, full of human life, to remain at his post in the hope of saving other lives would be an act of heroism so exalted as to constrain approval from all human hearts, and that courts, however cold and calm duty requires them to be in all cases, should place themselves in the position of the engineer at the moment of such imminent danger, demanding such instantaneous decision and action, and should not scan closely the grounds of hope he may have had to save others, though risking himself in the effort. It is the policy of the carriers, as well as that of the great public carried rapidly by their trains, not to encourage the officer in charge of the engine that moves those trains to abandon his post in the moment of danger, but to reward the courage of remaining, if there be a hope, however slight, of saving two trains from collision and wreck and the lives of hundreds aboard. Whilst, if there be no shadow of hope of averting disaster to others, the engineer should save himself; yet on a hope however faint, for reasons, however inconclusively establishing the soundness of his conclusion, that by risking his own life he would probably save other lives, he should remain at his post; and the act of heroism, though inoperative of good either to himself or others in the particular case, should be regarded as martyrdom to public policy, rather than want of precaution to save himself. No man needs much encouragement to save his own life. Self-preservation is the first law of nature. It requires kinship to Christ to die, or to risk death, to preserve the lives of others." Cited, 83/674; 92/660.

In Roach, 64/635, the plaintiff's husband was an engineer and was killed by jumping from a train when a collision was impending. The collision was caused by the engineer on the train, next

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in front, checking the speed of his engine at a curve. There was evidence in regard to his being afflicted with epileptic fits, and as to whether the company was chargeable with notice of it, and it was held that as to his negligence, it did not depend on his incapacity, by reason of fits or otherwise, to properly handle his train, but on whether, under the facts and circumstances surrounding him at the time of the injury, he was negligent in stopping at the curve. Cited, 83/674.

380. When an employee is at fault by leaving his place.

In Myers, 112/237, it appeared that the plaintiff's husband was front or head brakeman on the defendant's freight-train; that as such his place of duty was on top of the front cars of the train while it was running between stations; that he had no duty to perform on the engine, and while on it could not discharge any of the duties for which he was employed; that he was killed while voluntarily riding on the engine of the train upon which he was at work, while it was running between stations; that his death was due to burns and scalds from escaping steam, caused by the derailment and overturning of the engine upon which he was riding; that no one on the train was injured by the derailment except those on the engine; that three of the front cars were derailed, but maintained their upright positions. There was evidence from which the jury could find that the derailment was caused by the negligence of the railroad company, and that plaintiff's husband and other front brakemen had been in the habit of riding on the engine, and that he, at the time of the catastrophe, was so doing with the knowledge of the conductor and engineer, and that this was in pursuance of a custom known to the officials of the company. It was ruled that the widow of the employee of a railroad company who was killed by the derailment of a locomotive upon which he was riding, and whose presence thereon was in violation of a duty devolving upon him to be elsewhere, can not recover for the homicide, even if the derailment was due to the negligence of the company. Under such circumstances, it could not properly be held that the employee was free from fault directly contributing to his death. That such employee and others of his class had been in the habit of riding on the locomotive, and that he, at the time of the catastrophe, was so doing, with the knowledge of the conductor and engineer, and that this was in pursuance of a custom known to the officials of the

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company, did not render the above rule inapplicable, unless it further appeared that the deceased was on the locomotive in obedience to some order which he was bound to obey, or in the discharge of some duty which it was incumbent upon him to perform. And Fish, J., said: "It is well settled that if one employed to work at a designated place voluntarily goes to some other place, where he has no duty to perform, he can not successfully insist that he is within the protection of the rule that the master must exercise ordinary care to protect him from injury. See 3 Elliott, R. R. § 1303. Or, as stated in 1 Shear. & R. Neg. § 207: 'A servant can not recover for any injury which he would not have suffered if he had not voluntarily left his post of duty to take a position of greater danger, even though his act may be well meant, and his object to continue serving his master.'"

Where, according to the evidence, the ordinary duties of a conductor do not include the duty to couple and uncouple cars, except in case of a pressing emergency, and he is killed in performing such service, in the absence of such emergency, he is not without fault, and his widow can not recover damages from the company. Whether the pressing emergency exists is a question of fact for the jury to determine. If the jury should find that the conductor believed in good faith that such an emergency was upon him, and they should further find that he had good reason so to believe, then the mere act of coupling or uncoupling, or attempting it, will not be outside of his duty and make him to blame. The emergency must be one that is not brought about by the negligence of the conductor. He can not, by his own negligence, create an emergency, and then be held justifiable in acting outside of his regular sphere on account of it. Therefore, where it is alleged that the emergency was occasioned by the train being behind time, it is incumbent upon the conductor, or those claiming through him, to make it clearly appear by the evidence that the delay of the train was not caused by his fault or negligence. The presumption is that it was his fault, because he is the master of the train and all other employees are under his control. If the emergency was upon him, or if in his judgment it was upon him, and a reasonable man had a right so to judge from the facts, he would be at fault if he acted recklessly or imprudently. Even if a pressing emergency were upon him it was not his duty to do a reckless or imprudent thing. Sears, 53/630. Cited, 55/281; 56/277; 59/436; 61/279; 63/183; 106/798; 112/238.

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Where, in an action for personal injuries, it appeared that plaintiff, a freight conductor, was injured while uncoupling cars, which was no part of his duty, and contrary to the company's rules, and that there was no pressing emergency for him to perform this duty at that time, it is not error to grant a new trial on the ground that the verdict is contrary to an instruction to find for defendant unless the jury found that there was a pressing emergency. Kane, 85/858.

Where an engineer, whose duty it was to run a train from a point where it had been made up on to the main line of a railroad and thence to its destination, left his ordinary post of duty and went upon the tender, and while returning to the engine, which was going around a curve at a speed of about fifteen miles an hour, received an injury which could not have happened except for his going upon the tender, and where the evidence failed to show that his duty called him there, or that he was directed to go there by any person having authority to give such command, in an action brought by his widow to recover for his homicide, a nonsuit was properly granted. Strange, 133/730.

Under the rules of the railroad company which were involved in the present case, no duty was imposed upon the conductor to examine or repair the brake or any appliance connected with the operation of the same, such duty resting, under the rules, upon the subordinates of the conductor, and the duties of the conductor being simply those of supervision and direction. It follows from the foregoing that when the plaintiff went between the engine and the cars for the purpose of examining the air-hose used in operating the air-brake (the same being in a defective condition), there being no pressing emergency requiring him to perform this duty, which the rules imposed upon his subordinates, he was guilty of such fault as will preclude him from recovering damages for injuries sustained as a direct result of his having unnecessarily abandoned his position as conductor for the purpose of performing duties which, under the rules of the company, should have been performed by his subordinate. When a railway conductor, in the absence of any emergency or of circumstances so requiring, goes outside of the line of his duties as prescribed by the rules of the company, and thus places himself in a position of danger, and is injured by the moving of a train, he is guilty of negligence, and can not hold the company liable, even though the engineer causes such movement

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to be made without ringing the bell of the locomotive, and in so doing violates a rule of the company; and more especially is this true when the conductor, by reason of past experience, must be aware that the engineer, in the absence of any knowledge that the conductor is so exposing himself to danger, can, as to him, safely omit the ringing of the bell, and yet fails to inform the engineer of the intended risk which will render such omission hazardous to the conductor. McWhorter, 115/476.

It appearing that the railway company negligently erected the danger-signal post by placing it too near the track of the railway, this fact must have been well known by the deceased engineer, the plaintiff's husband, and it also appearing by uncontradicted evidence that he unnecessarily left his place upon the locomotive and exposed himself to danger for the purpose of getting a view of a hot journal, when he could have done so safely without leaving that place, his death was caused, in part at least, by his own negligence, and his widow was not entitled to a recovery from the company. Lumpkin, J., said: "Granting that the post was erected too near the track, the evidence establishes that this fact must have been known to the deceased. He passed over the road almost daily for a considerable period of time. The post, as already stated, was near a bridge; and, in view of all the evidence, it is almost impossible to conceive that he was ignorant of the existence of the post, or unaware of the distance it stood from the track. Under these circumstances, although it may have been his duty to look after the journals under the tender, and keep himself informed as to their condition, we think he should have exercised some care in selecting the place at which he would attempt to perform this duty. It would have involved only a few seconds delay to wait till the post was passed; and common prudence, surely, would have suggested the propriety of first looking to see whether there was anything which would render this attempt perilous at the particular point on the line of the road which his train was then passing. Certainly, if he could get a view of the journal without exposing himself to danger at all, he ought to have done so. The evidence is clear that, without leaving his seat in the cab, and without subjecting himself to any peril whatever, he might have seen the hot journal fully as well as from the position he actually assumed. To look at the journal from his seat would, it is true, have required a slight inclination of his head outside of the window of the cab, but not enough to bring his

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head in contact with the post, or in such proximity to it as to be dangerous. Inasmuch, therefore, as there was a way in which he could have performed his duty with respect to the hot journal with absolute safety, and he disregarded the safe method of so doing, and adopted another, which was in the highest degree dangerous, he was certainly guilty of some contributory negligence; and, this being so, his widow had no right to recover from the company." *Head*, 92/723. Cited, 111/713; 112/762. Dis., 1 G. A. 98.

In a suit by a widow against a railroad for the homicide of her husband, the evidence was as follows: The deceased was employed by defendant to work on a railroad; while so employed, one A., as "boss," directed him, together with other hands, to push certain cars loaded with iron, and directed them to stand on the side and shove them; the deceased voluntarily placed himself between two flat cars, and while they were being pushed and in motion, he fell; the car ran over his foot or leg, and from the injury he died. It did not appear when the deceased placed himself between the cars that the "boss" knew he had done so, or what relation this "boss" sustained to the deceased and his associates. It was held that the evidence failed to make out any case against the railroad, and a nonsuit was properly awarded. *Stanley*, 72/202. Cited, 104/682.

The plaintiff's husband, an employee of the street-railroad company, having been killed by coming violently in contact with a post very close to the track, while he was riding on the front end of an extra car, upon which he was being sent to the relief of a disabled car of the company, and it appearing that, at the time of the collision, he was standing on the step of the platform, leaning outward, and looking backward underneath the car on which he was riding, and there being no evidence showing he was then under any necessity or duty of being in this position, it does not affirmatively appear that he was free from negligence. Although the evidence warranted a finding that locating the post so near the track was a negligent act, it does not show that so doing was violative of any duty due by the company to the deceased at the time he was killed, and therefore this act was not, relatively to him, a negligent one, and as no other negligence was alleged or proved against the defendant, the plaintiff failed to establish that, so far as her husband was concerned, the company was negligent at all. *Sundy*, 96/819.

In *Whitton*, 106/796, it was held that when, in the trial of an action brought by the widow of a conductor against a railroad com-

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pany for his homicide, it affirmatively appeared from the evidence that he was in charge of and directing the movements of the train by which his death was caused, and that, instead of confining himself to the line of his duties on that occasion, which did not include coupling and uncoupling cars, he voluntarily, and in the absence of any emergency so requiring, went between two cars, one of which he knew to be in a defective condition, for the purpose of unchaining or uncoupling the same, the conclusion follows that he was "outside of duty, and at fault," and consequently there was no error in granting a nonsuit. Cited, 112/239.

In Webb, 61/586, it was held that a fireman or wood-passer having been killed while engaged in his business on the train, and his death having resulted from striking his head against some part of the fixtures of a water-tank situated on the roadside—most probably against an iron pipe projecting from the tank and reaching within a short distance of the train—his widow can not recover of the railroad company damages for the homicide, if the husband, though the pipe projected too far, could have passed it in safety by using due diligence on his part in the manner of prosecuting the business in which he was engaged. If his own negligence contributed substantially to the injury, there can be no recovery, as the doctrine of apportionment of damages on account of contributory negligence does not apply in such a case, and as § 2782 (2323) of the Code demands that the employee shall be free from fault or negligence. And Bleckley, J., says: "If he idly and unnecessarily exposed his person by leaning beyond the line of the engine and cars, and was thereby thrown against the water-tank, or the pipe which projected therefrom, when he could have passed in safety by using proper care and diligence in his business, he was at fault and his widow can not recover. If he was voluntarily out of his proper place or position, when he might and ought to have remained in it, and was killed in consequence, there can be no recovery." Cited, 63/182; 69/715; 88/210.

381. Loss of life in rescuing another, when defendant is not negligent.

In Jackson v. Standard Oil Company, 98/749, the plaintiff sued for the homicide of her husband. Lumpkin, J., said: "The evidence shows that the plaintiff's husband, Warren Jackson, lost his life in an attempt to rescue one Mitchell, who was exposed to the

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danger of suffocation from poisonous gas generated in a large iron tank, which he was engaged in cleansing, as a servant of the Standard Oil Company. The action was brought against this company to recover the value of Jackson's life. It appears that Mitchell was, or ought to have been, fully aware of the danger attending this work, and that he had been instructed how to guard against it; and it also appears that the company was in nowise negligent relatively to Jackson. Indeed, it may be stated, as a fair conclusion from the evidence, that the company was altogether free from negligence as to both these parties. This being so, there is no present occasion for exploring the vast mine of law relating to the liability of one through whose negligence another is placed in peril to respond in damages to a third person who in good faith undertakes to rescue his fellow being thus exposed to danger, and is injured or killed in the attempt. This case, upon its merits, turns upon the indisputable proposition that one who is guilty of no negligence at all can not be made liable to anybody. This is so obviously true as not to require argument. We refer, however, to the case of *Dona-hoe v. Railway Co.*, 83 Mo. 560, which is directly in point; and we also make the following extract from 1 Shear. & R. Neg. § 85, which cites the above-mentioned case: 'No one is liable at all, unless he is in fault. Thus, a railroad company could not be made liable for injuries suffered by one who, with the most praiseworthy motives, ran in front of a train to rescue another, who was unlawfully on the track and of whose presence the engineer in charge had no notice, actual or constructive, the train being prudently managed. In such a case neither party would be in fault, and therefore neither could recover damages,' and it was held that loss of life incurred in rescuing another from a situation of peril gives rise to no cause of action against one who is guilty of no negligence, either as to the person whose safety was imperiled, or as to the rescuer after his efforts to make the rescue had begun.

382. Attempted to get on his train as it moved away.

In *Reese*, 91/97, the suit was brought by the widow of Reese, who was employed on a freight-train of defendant, and was run over at night. The evidence indicated that he was attempting to get upon his own train as it was moving away from a station, missed his hold and fell, and was run over, first by that train and then by another that followed. The jury found \$5,000 for the plaintiff.

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A new trial was granted, and it was held that, there being no controlling question of law involved in the case, there was no abuse of discretion by the trial judge in granting a first new trial. Cited, 3 G. A. 638.

383. Not on duty when he was injured.

In *Flannagan*, 82/579, it was held that the fact that the husband killed by the running of the company's locomotive was one of the employees of the company would not preclude his widow from recovering damages, though he may have been in some degree negligent, the homicide occurring on a public street, remote from the place at which the deceased rendered service to the company, and at a time when he was off duty and had no concern with the business or affairs of the company. Bleckley, C. J., said: "Flannagan was not only not on duty as a servant of the company at the time he was killed, but was not at or near the scene of his duties. He was on the public street of Savannah and occupied the footing in every respect, with reference to the running of the company's trains at that place, of the general mass of the public. We think, therefore, that the rule of contributory negligence applicable to the public under like circumstances was applicable to him. Nor does this view militate in any degree with the case of *Henderson*, 69/715, or any of the cases therein cited." Cited, 130/85; 4 G. A. 711.

384. Negligence of deceased contributed to the injury.

There being clear and uncontradicted evidence that the plaintiff's husband, an employee of the railway company, was himself guilty of negligence in bringing about and contributing to the casualty by which his death was occasioned, she was not entitled to recover, and the court erred in denying a new trial. *Hallman*, 97/317. Cited, 112/239; 114/170.

Where two freight-cars, one of which was used as a station warehouse, had been left "unchocked" and "unbraked" upon a side-track having a slight downward grade, and, upon being put in motion by a sudden storm of wind, ran over and killed the railroad-agent, who at the time was crossing the side-track, holding an umbrella over himself inclined towards a blowing rain, so as to obstruct from his view the approaching cars, the railroad company was not liable

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for the homicide, it appearing that the deceased was the sole employee of the company at this station, having at the time full charge of the locating of these cars upon the side-track in question; that on this particular occasion they were left exactly as he directed; that he actually knew that the car by which he was stricken had not been "chocked" or "braked," and that it was within the scope of his duty to know whether or not the other car (it being the warehouse car) had also been left in this condition. If leaving the cars without "chocking" or applying brakes to the same was, under the circumstances, an act of negligence, it was negligence attributable to the agent himself. *Smith, 97/777. Cited, 127/246.*

385. Violation of ordinance is negligence per se.

In *Brantley, 93/259*, it was held that where a valid municipal ordinance, broad enough to cover the running of locomotives in yards of railroad companies within the city, limits the speed to five miles an hour, it is negligence per se, relatively to employees whose duty requires them to cross or be upon the tracks within these yards, to violate the ordinance by running at a higher speed. If such violation caused the death of such an employee, and if he was not at fault, and could not, by ordinary care and diligence, have avoided the consequences to himself which resulted from such violation, his widow would, under the statute applicable to negligent homicide, be entitled to recover.

386. Where the tracks of different companies are used, and where two companies use the same track at terminal points.

Where a train loaded with wood was transported over one railroad to a city, and, at the instance of the shipper, permission was obtained from the superintendent of the road for the train to proceed over the track of two other roads to a third, and over it to the point of destination, the train being manned by employees of the first road, and a person, by direction of the superintendent of that road, accompanied the train for the purpose of seeing that it was unloaded promptly and returned to the road to which it belonged, and where an arrangement was made with the superintendent of the third road for the train to proceed over its track, and he directed an employee to go upon the engine and act as pilot and inform the engineer of the curves and "tight places" in the track, the only duty or obli-

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gation owed by the third railroad company to the employees of the first company upon such train was to have a reasonably safe track over which the cars were to be transported. The person sent with the train to see to the unloading and return of the cars was not an employee of the last road over which the train ran, and charges of the court as to whether he was free from fault and negligence as an employee thereof, and whether it was in fault, were not applicable to the case. He was an employee of the first company, and the only obligation the last company was under as to him was to furnish him a safe track on which the train might safely run. If it failed to do this, and he was killed solely by reason of the defect in its track, his widow would be entitled to recover therefor. If the injury was caused solely by a defect in the trucks of the car belonging to the first company, she would not be entitled to recover from the last. If the injury was caused both by a defect in the track and by a defect in the trucks, she would be entitled to recover an amount in the proportion that the defect in the track as compared to that in the trucks contributed to the injury. The last company, as to the safety of its track, was liable to Killian as a passenger; and if the injury was caused solely by a defect in the track, and he was not negligent, or could not have avoided the injury by the exercise of ordinary care and diligence, the plaintiff would be entitled to recover the amount of damages she has sustained. If he was negligent, but could not have avoided the injury caused by the defendant's negligence, by the exercise of ordinary care, then the damages should be diminished as in cases of contributory negligence. This case differs from *Mayes*, 49/355. There it was ruled that the company was liable to third persons and to the public for injuries resulting from a collision caused by allowing a train of another to come upon its franchise, and did not refer to an employee of the company thus using the road. *Killian*, 79/234. Cited, 82/807; 112/658.

Where two railway companies, each under its own franchise, use the track of one of them in common, at a terminal point, the one owning the track is responsible for the consequences of its negligence in failing to render harmless to the employees of the other company a low bridge spanning the track, if the duty of taking proper precautions for that purpose was upon it, and it alone. The mother of an employee of the other company, if otherwise in a situation to sue, may recover for the homicide of her son, caused by

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such negligence. In such case, though it be not alleged that the company not owning the track (that is, the master of the employee) was ignorant of the danger or of the conditions which caused it, it will not be assumed, in deciding upon a demurrer to the declaration, that it was negligent in running the train to which the employee was attached when injured; consequently the question whether any negligence of that company could be imputed to the employee, so as to render him chargeable with contributory negligence, is not now for decision. *Ellison*, 87/691. Cited, 6 G. A. 99.

387. The cause of the death a question for the jury.

In *Davis*, 86/76, the plaintiff sued for the homicide of her husband. The evidence was conflicting upon whether his death was caused by the negligence of the servants of the company in moving an engine against a car upon which he was at work by which he was thrown from a ladder and injured so that he died, or by a disease not consequent upon that injury. The jury were properly instructed as to the law of the case and having found in favor of the plaintiff, and there being sufficient evidence to authorize the verdict, a new trial was denied.

388. Ordinary and reasonable care and diligence shown.

In *Harbuck*, 91/598, a widow sued for the homicide of her husband. Harbuck was a section-boss on the Georgia Pacific Railway the track of which was used by the defendant's (the East Tennessee, Virginia and Georgia Railway's) trains. He was walking about the middle of the track, inspecting it, when he was struck from behind by defendant's passenger-train, running about thirty miles an hour and on schedule time. The point where the casualty occurred was about two miles beyond the city limits of Atlanta, near a private crossing over the railroad. At this point the Western & Atlantic Railroad ran parallel to the Georgia Pacific, and freight-trains were passing on the former. The alleged acts of negligence of defendant's servants were in blowing no whistle and giving no warning of the approach of the train, in not checking the speed and endeavoring not to strike Harbuck when he was evidently unaware of its approach, and in not keeping proper lookout to see if any one was on the track. The train was between two and three hundred yards

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from Harbuck and the men with him when it came in sight, having just rounded a curve. It was held that, according to the evidence of those witnesses who must have been best acquainted with the actual facts, the railway company made it appear that its agents exercised all ordinary and reasonable care and diligence, and that the killing of plaintiff's husband took place in spite of such observance. The acts of diligence comprehended blowing the whistle, sounding the alarm, applying the brakes, and, so soon as it was discovered that the signals given were not having their natural and ordinary effect, making an effort to stop the train. Any and all material conflict with adverse witnesses may be reconciled upon the theory that the plaintiff's witnesses erroneously attributed all the whistling which they heard to the locomotives which happened to be near by upon the track of the Western & Atlantic Railroad. These witnesses could have been mistaken in thinking that the whistling which they heard all came from locomotives on the latter road, but the defendant's witnesses could not possibly have been mistaken in this respect. They knew whether sounds were made by the locomotive of the train of the East Tennessee, Virginia & Georgia Railway on which they were traveling, and consequently, without unnecessarily imputing perjury to them, their testimony on that subject could not be disbelieved. The number of witnesses who coincided substantially in their testimony on this material point would forbid the adoption of any reasonable theory of collusion by which to account for their evidence; and, without either ignorance or collusion on their part, the facts must have been in accordance with their testimony.

This being a suit for damages for a tortious homicide, and the evidence showing without contradiction that the defendant was not negligent in any of the particulars alleged, a verdict for the plaintiff was contrary to law. Austin, 114/905.

389. When the relation of master and servant must be shown.

On the trial of an action for damages brought against a railway company on the theory that the relation of master and servant existed between it and the plaintiff's deceased husband, who met his death by reason of the negligence of a third person, alleged to have been also in the company's employ, it is error to reject evidence

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tending to establish its defense that it had never employed either the plaintiff's husband or such third person, but that both were really in the service of an altogether different company, operating under a similar name. *Strauss*, 110/189. Cited, 111/13; 112/604, 658; 119/162.

390. Illegal transaction, injured while engaged in.

The case of *Cannon*, 38/199, was a suit by a widow to recover for the death of her husband. The husband was an engineer on the railroad and at the time of the injury he was engaged in the transportation of Confederate soldiers on the road for the purpose of making war upon the government of the United States. It was held that when two or more parties are engaged in the same illegal transaction, in violation of the supreme law of the land, and one of them is injured by the carelessness or negligence of the other, the court will not lend its assistance in favor of either party to recover damages. Cited, 40/54; 120/351. The same principle was enforced in *Martin*, 40/52. Cited, 120/352. *Martin* was an officer in command of Confederate troops on his way to engage in the battle of Chickamauga, and the road was transporting him for hire paid by the Confederate government. And also in *Redd*, 48/102; *Redd*, 54/33. Cited, 120/352.

ACTIONS BY WIDOWS OF PASSENGERS.

391. Difference between announcement of station and invitation to get off.

In *Thompson*, 76/770, the plaintiff sued for the homicide of her husband. The homicide occurred near Station No. 6 of the railroad, and was caused by the deceased's leaving the car before it reached the station at a spot some several hundred yards below it, and being run over by a freight-train while he was making his way towards the station. The train on which he was a passenger had been stopped because freight-trains blocked its way. The position of the plaintiff was that her husband was induced to leave the car by the announcement of, "No. 6 passengers get off," or words to that effect, by the conductor or authorized officer of the road. The defendant contended that no such announcement was made, but he left the car of his own volition. It was held that there is a difference between the ordinary announcement of a station as the train

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approaches it, so that the passengers may prepare to leave the train when it reaches the station, and the announcement after the train had stopped; in the latter case, it is equivalent to inviting the passengers for that station to leave the train. If the passenger in this case got out without such an announcement, it was his act; if he was deceived by the announcement it was the company's act, so far as fault is concerned. After he is out, if prevented from getting back by the conductor, though he got out without the announcement, it is not diligence towards a passenger, if the place be dangerous, not to take him back, even if necessary to stop the starting train to do so; and after he gets out on their announcement, or is prevented from getting back, if he can avoid the consequences of such conduct by ordinary care in looking out for danger and avoiding it, then, if he does not use such care, he can not recover. Cited, 109/795; 116/745; 3 G. A. 355.

392. Liability and defenses of the company.

In *Thompson*, 76/771, a suit by a widow for the homicide of her husband, it was held: The railroad company contracted to give the passenger in this case a safe transportation to the station of his destination, and until it carried him to that regular and safe landing, it was responsible for slight neglect, extraordinary diligence being the measure of its care for him to that place. But though the company may have been negligent, it could defend itself and defeat a recovery of damages by showing that, when the passenger was endangered by its negligence, he could have avoided the consequences of it by the use of ordinary care, or that his own negligence caused the injury. Cited, 109/795.

393. Conspirators causing death.

McEwen v. Springfield, 64/159, was a suit by a widow for damages for the homicide of her husband. It was held that if two or more persons conspire together to do an unlawful act of violence on the person of another, and they embark in the execution of such purpose, the law would not protect each against the consequences of the others not strictly observing the bargain; each must contemplate that before joining with his fellow to break the law, and each becomes responsible for the worst act done and the greatest damage caused by any of his fellows, if done in pursuance of the unlawful purpose.

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394. Record of defendant's acquittal of murder is not evidence for defendant.

In suit by a widow for the homicide of her husband, the record of the acquittal of the defendant under an indictment for the murder of the husband is not evidence for the defendant. *Cottingham v. Weeks*, 54/275.

ACTION BY CHILD FOR MOTHER'S DEATH.**395. Construction of statute.**

In *Venable*, 65/55; 67/697, it was held that this law gives a right of action against a railroad by the minor children for the homicide of the mother, and does not restrict the right to the homicide of the father; that the word "parent" meant either father or mother in its ordinary sense, on whom the support of the child was cast by law. Cited, 70/683; 77/454.

In *Scott*, 77/450, it was held that where a husband or father is dead, a right of action arises in favor of children for the homicide of their mother, but they have no such right of action when the father is alive.

396. Negligence of deceased defeats a recovery.

In *Phillips*, 87/272, minor children sued for the death of their mother. Deceased was killed by a train at the north end of a trestle one hundred and fifty yards long and from twelve to fifteen feet high. She and another woman had been to a water-tank at the other end of the trestle, and were on their way back. They did not commence to run until the train had passed the water-tank, where they thought it would stop. Deceased fell, and her companion tried to help her up, but before she could do so she was hit by the train, and thrown from the track, and deceased was run over and killed. The train stopped with the front driving-wheels on her. Held that, under these facts, the court did right in granting a nonsuit in the case. It was gross negligence on the part of two females to attempt to walk upon a trestle one hundred and fifty yards long and from twelve to fifteen feet high, near the time when a train was due; it further appearing that the servants of the railroad company did all that was possible to be done after they discovered the females on the trestle.

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ACTION BY HUSBAND FOR DEATH OF WIFE.

397. Wife's negligence defeats recovery.

It affirmatively appearing from the evidence that the defendant company was not guilty of any negligence, and that the death of the plaintiff's wife was attributable to her failure to observe ordinary care for her own safety, a verdict for the defendant was demanded. The trial court having correctly so adjudged, this verdict will be allowed to stand, without closely scrutinizing the various grounds of the motion for a new trial; for, irrespective of the errors therein alleged, the only result which could have been legally arrived at upon the trial was reached. Marshall, 103/586.

In Hopkins, 110/85, it was held that where the evidence showed that the wife, by ordinary care, could have avoided the consequences to herself of the defendant's negligence, which was not wanton or criminal, and that her homicide was the result of her gross negligence, the railroad company was not liable. Fish, J., said: "Though the railway company was guilty of negligence, in that its engineer failed to check and continue checking the train when he reached the blow-post established for the crossing upon which plaintiff's wife was killed, yet after the negligence of the railway company began, and it was apparent to the decedent that the engineer was not checking the train, but that it was coming to the crossing at an extremely high rate of speed, it was in her power to have avoided danger from the negligence of the defendant by the exercise of ordinary care. Instead, however, of exercising ordinary care, her conduct subsequent to the period at which the negligence of the defendant company began and was apparent to her was itself so grossly negligent as to debar her husband of the right to recover for her homicide. According to the engineer's testimony, when he first saw her he was in four or five hundred yards of the crossing, and the train was going at a speed of fifty to sixty miles an hour. 'She came up from a little sink, from the public-road grade, and started on a run towards the crossing.' She was between fifty and seventy-five feet from the crossing. 'When he first saw her running towards the track, he was in three hundred yards of her, and she looked like she was trying to make the public crossing.' She was looking right at the train, and did not take her eyes off it. 'She seemed to be trying to outrun it to the crossing.' 'She was running in the direction of the public crossing, looking

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over her shoulder at the train.' The reason he did not stop the train was because he could not. He supposed she would stop before she got to the railroad. 'Didn't think that she would run right on to the track, right in the way of the train, and she looking at it.' He put on brakes just before he got to the crossing, when he saw that she would attempt to cross ahead of the train, and was then seventy-five or one hundred yards from her. This evidence shows such reckless conduct on the part of the decedent as would keep the railroad company from being liable in damages for her death, unless it was guilty of wanton or criminal negligence. Code, §§ 2781 (2322), 4426 (3830), 101/217; Parish, 102/285, 40 L. R. A. 364. Under the testimony of O'Neal we do not think that the defendant was guilty of wanton or criminal negligence. He was the engineer who had control of the locomotive, and the responsibility of the defendant company is to be measured by his conduct. In the light of his testimony, we do not think that his conduct was wanton or criminal. From his evidence it appeared that he, knowing that the deceased saw the train but a short distance away, approaching the crossing at tremendous speed, naturally reasoned that she would not attempt to cross the railroad-track immediately in front of it, but would stop before getting near enough to the rails to be struck by the locomotive, and that as soon as he saw that, without regard to her safety, she was persisting in her attempt to outrun the train to the crossing, he adopted the most effective means to stop the locomotive, but unfortunately it was too late to prevent the accident." Cited, 121/39.

MOTHER'S ACTION FOR HOMICIDE OF CHILD.**398. Mother's suit for homicide of child not barred by father's suit for services.**

Prior to the Act of 1887, Code § 4424 (3828) the parent's only right of action for the negligent killing of a minor child was for the loss of the services of the child. Perry, 85/193.

The Act of 1887 does not purport to withdraw from the father any right of action which he had before by the common law. What it does is to confer upon the mother a right which neither of the parents had at common law. The statutory right of the mother is to recover for the child's death; the common-law right of the father is to recover for the loss of services which the child would

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have rendered him had the child not been disabled by the tort complained of. *Factory v. Davis*, 87/648. And it is no bar to a suit by the mother for the homicide of her minor son, that the father has a pending suit in which he claims damage for the loss of the son's services up to the time the latter would have arrived at his majority. *Glover*, 92/132. Cited, 135/635.

399. The right of action.

Under this statute the father has no right of action for the homicide of a minor child, if the mother was in life at the time of the homicide, and if she dies without suing no right survives to, or is conferred upon, the father. *Frazier*, 96/785. Nor does the right of action survive to an administrator of a parent who, being entitled to bring such action, dies without instituting it. *Frazier*, 101/77. Cited, 111/581; 116/148; 125/470; 126/798; 7 G. A. 281.

The suit was for damages resulting from the homicide of plaintiff's son, under the statutory right conferred by the act of 1887 (Acts 1887, page 43), not merely under the Code of 1895, § 3021 (2502), for injury to him. In a case of that character, if otherwise entitled to recover, the plaintiff was authorized, under the act of 1887, now embraced in the Code of 1895, § 4424 (3828), to recover the full value of the life of the deceased; and there was no error in refusing to strike on demurrer so much of the petition as referred to the value of the earning of the deceased during his minority. In this connection see *Glover*, 92/132 (4), 142 (18 S. E. 406). *McDonald*, 135/635.

400. Dependence and contributions at the time of the injury.

The parent must at the very time of the injury be dependent upon the child, and the child at such time must be actually contributing to the parent's support. *Amos*, 104/811. Cited, 126/797.

In order to warrant a recovery by a mother for the homicide of her child, it must appear, not only that the child contributed to her support, but also that she was dependent upon the child for such support. A charge which eliminates from the consideration of the jury the latter element is inaccurate. *McDade*, 105/134.

There was, in the trial of an action by a mother for the homicide of her son, no error in charging the jury that she could not recover

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without showing that he contributed to her support. An instruction to this effect did not necessarily negative the proposition that it was also essential for her to prove that she was dependent upon the son; and the court's omission to charge upon the subject of dependence will not be held for a new trial, when it appears from undisputed evidence that the mother was in fact dependent upon the deceased. *Barnett*, 104/582.

In *Smith v. Hatcher*, 102/158, it was held that it is essential to the maintenance of an action by a parent for the homicide of his child that the former should, at the time of the homicide, be to a material extent dependent upon the latter for a support, and that the child should then be actually contributing thereto. Accordingly, where a son, while serving a term as a penitentiary convict, was unlawfully killed, but at the time of his death was not actually contributing to his father's support, the latter could not recover for the homicide. The petition alleged that the deceased "contributed to the petitioner's support" and "petitioner was dependent upon his said son for support." *Lumpkin, J.*, said: "It will be observed that the petition does not allege that the plaintiff's son was at the time of the homicide actually contributing to the plaintiff's support. The phrase, 'contributed to petitioner's support,' construed in connection with the other allegations of the petition, manifestly means that the deceased son had, before his confinement in the penitentiary, contributed to the father's support. Taking these allegations all together, he could not be doing so while engaged in his labors as a convict. The petition must therefore be taken to mean that the contribution by the son to the father's support was something which related to the past; and also that there was an expectation on the parent's part that such contribution would be resumed after the son's sentence in the penitentiary had been served out and he had been discharged. The statute giving a right of action to a parent for the homicide of a child, and conferring upon the former the right to recover the full value of the child's life, is, to say the least, a harsh one, and must be strictly construed. This court in *Clay, infra*, held that the word 'or,' after the word 'dependent,' should be construed to mean 'and;' therefore, in order to entitle a parent to recover, it must appear that he or she is dependent on the child, and that the latter contributes to the parent's support. Special attention is called to the use of the verbs 'is' and 'contributes' in the present tense. The law does not, therefore,

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mean that a parent may recover for the homicide of a child upon whom he or she has been dependent and who has contributed to the parent's support; nor for the homicide of a child upon whom the parent might, at some future time, become dependent, and who might, but for the homicide, have contributed to the parent's support. The test is applied at the time of the death. The actual condition at that time is to be looked to. Neither the past nor the uncertainties or the possibilities of the future are to be considered. According to the petition in the present case, the deceased son had been for more than a year before he was killed, a penitentiary convict, under a sentence which would not have expired until after the lapse of three years and some months. He was in the custody of the law, chained, confined, and, so far as the petition shows, absolutely without ability to contribute to the father's support. The petition does not allege that he was then contributing. It could not, upon the facts therein stated, truthfully have so alleged." Cited, 105/139; 104/811; 111/577; 117/169; 121/464.

In *Western Union Telegraph Co. v. Harris*, 6 G. A. 260, it was held that the fact that a parent is entitled to the earnings of his minor child may be a circumstance tending to corroborate other evidence of the parent's dependence on the child, and of the fact that the child substantially contributed towards the parent's support. The well-recognized interdependence of parent and child upon each other during minority, and the right of a parent to the assistance of his minor child, might also tend to repel any inference arising from evidence tending to show that dependence and contribution, shown to have existed in the past, had been terminated. Russell, J., said: "It is well settled that the dependence of the parent upon the child, referred to in § 4424 (3828) of the Code, need only be a partial dependence, and that it is sufficient if the contribution made by the child in aid of the parent's necessities be a substantial contribution."

A partial dependency by a father (the mother being dead) upon the contributions made by an unmarried child to his support is sufficient to entitle the former to maintain an action for the death of the latter by the wrongful act of a third person. Witt, 4 G. A. 149.

In a suit for damages by a father for the homicide of his minor child, brought under the Code, § 4424 (3828) it is not necessary, in order for the plaintiff to recover, that he show by the evidence that he depended alone upon the deceased child for his entire sup-

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port. It is sufficient if he establish partial dependence upon the child's labor, accompanied by substantial contribution therefrom to his maintenance. *Henson*, 121/462. Cited, 135/635; 4 G. A. 151; 6 G. A. 261.

An action by a mother, under the Code, § 4424 (3828) for the homicide of a child who contributed to her support and upon whom it was claimed that she was dependent, will not be defeated by proof that a tract of land, title to which is in another child, is charged with the support of the mother, when, under the evidence, the jury were authorized to find that neither the income which might be derived from the use of the land, nor the sum which would probably be derived from an investment of the proceeds of a sale of the land, would place the parent in a condition of independency. In a suit under the code section cited above, it is not necessary, in order for the plaintiff to recover, that she show by the evidence that she depended alone upon the deceased child for her entire support. It is sufficient if she establishes partial dependence upon the child's labor, accompanied by contributions therefrom to her maintenance. *Savannah Electric Co. v. Bell*, 124/663. Cited, 6 G. A. 267; 135/635; 8 G. A. 196.

It appearing from the petition that at the time of the death of the plaintiff's son he was in the employment of the defendant company as a brakeman and switchman on a freight-train, and that the negligence of the other employees of the company was the proximate cause of her son's death, the latter himself being in the discharge of his duties and free from fault and not guilty of any negligence contributing to his death; and it further appearing that the plaintiff was a widow dependent upon the deceased for a support, and that he contributed towards her support, a general demurrer to the petition was properly overruled. *Niles*, 131/599.

401. Actions by parents illustrative of the foregoing principles.

The intention of the act of the legislature providing that "a mother, or if no mother, a father, may recover for the homicide of a child, minor or sui juris, upon whom he or she is dependent or who contributes to his or her support," was not to give the right of recovery to the mother or father unless he or she was dependent upon the child for support, and the child, before his death, contributed to the support of such parent; for the word "or" after the

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word "dependent" the word "and" should be substituted. In the absence of an allegation that the parent plaintiff was dependent upon the deceased child, and it being uncertain from the evidence that the deceased contributed to the support of the parent, a new trial was proper, after a verdict in the parent's favor. Clay, 84/345. Cited, 86/237; 89/566; 93/372; 102/160; 104/586; 105/138; 6 G. A. 264.

In Daniel, 86/237, it was held that the mother may recover where the child contributed to her support and she was substantially dependent upon such child in part for support, although she was likewise dependent upon her husband and her own labor. Blandford, J., said: "This court did not mean by the decision in Clay's case to decide that the mother could not recover unless she was wholly dependent upon such child for a support, but, on the contrary, we think the meaning of the statute is that a mother may recover for the homicide of a child who contributed to her support when she was in whole or in part dependent upon such child for support substantially. We think the words used in the statute, 'who contributes to his or her support,' mean that the contribution to the father or mother by the child need not be wholly sufficient, but only such as in part sufficient, for such support; and that the word 'dependent' means wholly or in part dependent materially upon such child for support. For instance, a mother may have several children who support her, or contribute to her support, and she may not be dependent upon one child more than another; yet if she be dependent upon any one of them wholly or partially, and he contributed to her support, she would be entitled to recover for the homicide of such child, if killed by the negligence of any railroad company, its servants or employees." Cited, 89/566; 93/372; 111/574; 135/635.

In Johnston, 89/560, it appeared that the son, for whose homicide the mother sued, was eighteen years of age. He contributed to her support—she depended on his labor. Her husband, who was fifty-five years old, contributed to her support. It was held that, under the rulings in the Clay and Daniel cases, the mother could recover the full value of the life. Cited, 111/574; 121/464; 124/665; 135/635.

Where father and mother and minor children all reside together, and are mutually dependent upon the labor of the family for support, a minor child over fifteen years of age, whose labor, or the

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proceeds of it, come into the common stock, is to be considered as contributing substantially to the support of the mother. Bleckley, C. J., said: "The father, mother, and minor children all resided together, and were mutually dependent upon the labor of the family for support. The deceased child, although not sixteen years of age, performed some labor, and it or its proceeds went into the common stock. Evidence to prove all this, or which tended to prove it, was admissible, and, if this condition of affairs was established, the deceased son might well be considered as contributing substantially to the support of his mother. Members of the same household, who live by their common labor and its proceeds, have a mutual dependence one upon another. Certainly so, unless it be affirmatively shown that a particular member consumes as much, or more, of the common stock than he contributes to it. Even that would not be a conclusive test, for the services of a child to a mother, or of a mother to a child, may well be reckoned as contributing substantially to the support of the recipient far beyond any money value which the services may have, and the chief element of dependence may be in respect to personal service of this nature. Moreover, in the case of laboring people, some regard must be had to the probability of future dependence of an older member of the family upon younger ones. A son between fifteen and sixteen years of age, whose vocation it is to labor for the family, may well be regarded as one of the stays and props, both present and future, of his mother, she being also a laboring woman, and liable to become disabled by age or infirmity before her son shall have passed the meridian of life." Glover, 92/132. Cited, 93/372; 111/574.

Where a boy eleven years old, whose labor was worth six dollars per month, and who resided with his parents, worked with his father on a farm, and rendered services to his mother about the house, in the performance of her household duties—the benefit of his labor and services being thus realized by the parents in the support of themselves and their family, they being laboring people, and mutually dependent upon the labor of one another for a support—the mother was dependent upon the boy, and he contributed substantially to her support. Gravitt, 93/369. Cited, 105/139; 111/574; 121/464; 135/635.

In Glover, 92/132, a mother sued for the homicide of her minor son. She alleged that she was dependent on him and that he con-

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tributed to her support. It was held that evidence of the father's physical disability to labor is admissible in behalf of the mother, as tending to show her partial dependence on the minor son whose homicide is complained of. Bleckley, C. J., said: "There was no error in admitting evidence of the father's physical disability, and consequent impairment of ability to labor. He was a laboring man, and without fortune. This being so, anything which reduced his capacity to perform labor whereby to procure the means of support for the plaintiff, his wife, would render her less independent of any aid from her children, including the deceased son. The evidence, therefore, would tend to show her partial dependence on that son for support, present and future. The disability referred to had its origin long before the homicide of the son, and was in some degree operative at the time of the homicide, and has been so ever since." Cited, 93/372; 111/574.

In a suit by a mother for the tortious homicide of her minor son, nine years of age, it was alleged in general terms that the mother was dependent upon the son for support and that he contributed to her support. In a separate paragraph it was also alleged that the son contributed to the support of the mother from twenty-five to fifty cents a day from his earnings. It was not erroneous to overrule a special ground of demurrer which complained that the petition did not allege how, or by what business or work, the deceased earned the money with which he so contributed to the support of his mother. According to the former decisions of this court, a mother may recover damages, under the Code, § 4424 (3828) for the tortious homicide of her son, who left no widow or child, if she was wholly or partially dependent upon his labor for support and he contributed substantially therefrom to her maintenance. Henson, 121/462 (49 S. E. 278); Bell, 124/663 (53 S. E. 109). If she were accustomed to earn money, and her individual earnings were sufficient to adequately support her in keeping with her station in life, she would not be dependent in the sense as contemplated by the provisions of the statute above mentioned. Spinks, 111/571 (36 S. E. 855). But if the deceased were a youth, nine years of age, who had been left to the rearing of the mother by the father from the time he was three years of age, and the father had left the family and was living in a state of separation from the mother, and the earnings of the mother and those of the child, who were living together, were used for the common support of the two,

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and the earnings of both were necessary to the support of both, the mother would be dependent upon the child in the sense as employed by the statute. Daniels, 86/236 (12 S. E. 365); Johnston, 89/560 (15 S. E. 908); Glover, 92/132 (18 S. E. 406); Gravitt, 93/369 (20 S. E. 550, 26 L. R. A. 553, 44 Am. St. R. 145); Henson, 121/464 (49 S. E. 278); Maloy, 77/237 (2 S. E. 941). The fact that the earnings of the child alone might not be sufficient to support himself would not conclusively show that the mother was not dependent upon his services. Glover, *supra*. Under the ruling announced in the foregoing headnote, the evidence introduced for the purpose of showing that the mother was dependent upon the earnings of the deceased for support of herself was sufficient to present a jury question as to whether she was so dependent. McDonald, 135/635.

402. Subject continued.

In Spinks, 111/571, it was held that a man whose earnings are sufficient to adequately support himself is not "dependent," within the meaning of § 4424 (3828) of the Code, although he may by law be chargeable with the maintenance of others, for the support of whom and himself such earnings are insufficient. Accordingly, a father whose monthly wages were enough to more than afford him individually a support commensurate with his circumstances and standing in life was not, under the provisions of the section cited, entitled to recover the full value of the life of an unmarried minor son tortiously killed, and whose mother had died, although, because of the insufficiency of the father's wages to support himself and also his family, consisting of a second wife and minor children, he received contributions in money from the son while living. Lumpkin, P. J., said: "The act is, to a considerable extent, compensatory in its character. This being so, what was its design relatively to the compensation of parents? We think that in this respect its underlying principle was to provide for parents of both sexes, who, by reason of poverty, age, or physical infirmity, were incapable of supporting themselves, and especially for mothers without means, who because of this and of their sex, were so incapable. The condition of dependence contemplated by the General Assembly was that of the parent with relation to his or her personal need of aid in obtaining a livelihood. We can not believe it was the legislative intention to assist a self-sustaining father in taking care of others,

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whose support he had voluntarily undertaken, or with which he was legally chargeable. The true spirit of the law was to help both mothers and fathers who were in a substantial degree themselves dependent upon a child, and not to help members of their families who were dependent upon them or the child. The cases of Daniels, Johnston, Glover, and Gravitt, *supra*, do not conflict with the ruling now made, or with any of the views above expressed. They are authority for the proposition (1) that, to entitle a mother to recover for the wrongful killing of her child, it is not incumbent upon her to show that she depended upon him alone for a livelihood, or that he furnished her entire support, but that partial dependence upon the child's labor, accompanied by substantial contribution therefrom to her maintenance, was sufficient; and (2) that where a family of working people, including parents and a minor child, were mutually dependent upon the labor of one another for a livelihood, and the child rendered valuable services, of which the mother got the benefit, she was dependent upon him, if he thus contributed substantially to her support. It is to be observed that in all of these cases the action was brought by the mother. A mother without property is an essentially dependent member of a household consisting of her husband, herself, and their children. She may render many valuable services and perform many onerous duties, but, when it comes to obtaining the necessities of life—food, clothing, fuel, and the other essentials to human existence—she is, in the very nature of things, dependent upon each and every member of the family whose labor produces money or supplies. This is the way in which every humane person regards a mother in such a situation. It is ordinarily quite different as to a father. Manhood, which is self-sustaining, and more than self-sustaining, is not a condition of dependency. Minority is an element of dependency, in both males and females, and the female sex of itself constitutes such an element in adults, but not so as to the sex masculine." Cited, 111/879; 117/169; 121/464; 135/635; 4 G. A. 150.

403. Conduct of deceased.

In Plunkett, 105/203, it was held that this being an action by a mother for the homicide of her son, and the declaration alleging that the deceased was an employee of the defendant railroad company, and was engaged as a car-sealer in its yard, and that his death was brought about by being crushed between two cars where an

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opening had been left in the train of cars for the use of the employees in the yard, such opening being closed up by a sudden movement of the train without notice to deceased; and the evidence showing that the deceased was injured while attempting to go through an opening which was not left for the use of the employees in the yard, and was only such an opening as was usual and necessary from time to time in shifting cars in the yard—there was no error in granting a nonsuit. Cobb, J., said: "Such being the case, the defendant was under no duty to notify its employees when this opening would be closed up; and therefore an employee who attempted to use such an opening going from place to place in the yard took the risks incident thereto, and, if injured, would have no right of action against the company. Cited, 108/795, 798.

It was erroneous, on the trial of an action brought by a mother against a railroad company for the homicide of her minor son, a youth of sixteen years, to direct a verdict for the defendant, when, under the evidence submitted, the following were disputable questions, viz.: Whether or not the parents of the deceased consented to his employment by the company in the work in which he was engaged when killed; whether or not the deceased was familiar with the duties incident to his employment, and, if not, whether he was or was not properly instructed and warned as to the dangers attendant upon a performance thereof; whether or not he was free from negligence as to the occurrence by which his death was occasioned; and whether or not the same was caused by the negligence of the company or its employees. Black, 104/561.

In Raden, 78/47, it appeared from the plaintiff's testimony that two boys, seventeen years of age, started from the house of their employer at night to go to the homes of their mothers for the night. Fifteen or twenty minutes after they left, the service-train on the railroad went by. They had plenty of time to have crossed the railroad and reached home. They were struck by the train at a public-road crossing; one of them was killed and the other seriously injured. The witness, by whom the plaintiff's sought to establish their right to recover, testified that the boy who died had told him that they had stopped at the crossing, and the witness was satisfied that they were asleep. It was held that a nonsuit was properly granted; and that to go to sleep on a railroad-crossing was such negligence and recklessness as would prevent a recovery, even though the railroad company might have been negligent. Hall, J.,

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said: "As both parties seemed to consider and treat the case in the court below that these boys were injured while asleep on the public crossing, we will so consider the cases. It is quite manifest if these boys had been asleep upon the railroad-crossing, that their parents could not recover, because the injury was caused by their own negligence. Ordinary care would have induced any one not to go to sleep on a crossing of a railroad, and the mere going to sleep on the crossing was great negligence and recklessness." It does not appear from the report of this case that the statement by the witness that "he was satisfied that they were asleep" was objected to. Cited, 102/288.

In Littlejohn, 74/396, it was shown that the plaintiff's minor son was employed as a switchman and car-coupler; while engaged in shoving a car from a side-track to the main track, he was caught between the tender of the engine and a car, and crushed to death; he was looking towards the engine, when he should have been looking ahead at the car before him; if he had been at the place where he should have been, he would not have been hurt; no negligence was shown on the part of defendant's servants or agents. A verdict for the defendant was demanded by the evidence.

Where a lineman of a telephone company, of experience, aged nineteen years, was killed by contact with a wire of an electric lighting company, which had been strung on the poles of the telephone company, and from which wire the insulation had worn off near the pole which he had climbed, and for several feet on each side of the pole, he knowing, or being able to know by ordinary diligence, that the wire was so exposed, his mother can not recover from the electric lighting company the value of his life. Dorsey, 119/363, this case again, 121/697.

404. The right is unaffected by residence.

The right of action given a mother for the homicide of her son upon whom she is dependent in whole or in part for support is not confined to residents of this State, but belongs alike to all mothers under like circumstances wheresoever they may reside. Glover, 92/132.

405. Action by administrator under South Carolina statute.

If a conductor of a train ejected a passenger so that he was run over and disabled by such train, and another train of the same road

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passing shortly afterwards extinguished what life was left, a right of action arose whether the actual death was caused by the first or second train. *Nix*, 68/572. Cited, 73/652; 116/157; 3 G. A. 5.

406. Damages confined to injuries of which pecuniary estimate can be made.

In actions of this sort the jury can not find vindictive, punitive, or exemplary damages. They are confined to injuries of which a pecuniary estimate can be made, and can not take into consideration the mental sufferings occasioned to survivors by the death. *Paulk*, 24/356. Cited, 71/422.

The case *Killian*, 79/234, was brought to recover damages for the homicide of the plaintiff's husband. The declaration averred that the plaintiff had been "deprived of the society, company and companionship of her husband, causing her great pain and suffering, and leaving their infant child, about twelve years old, fatherless." On motion, the averment was stricken, and testimony in support of it was rejected, on the ground of irrelevancy. This action of the court below was affirmed. The case was cited in *Chapman v. Telegraph Co.*, 88/770, and it is there said: "Statutes have been passed giving recovery for homicide against the slayer; but the policy has invariably been to confine the right of action to a party sustaining pecuniary loss. And in actions on such statutes, even by the widow of the deceased, grief and anguish can not come in for compensation."

407. Measure of damages, rule prior to 1878.

Where a suit was brought by a widow for the homicide of her husband under the law as it stood prior to the Act of 1878, which gave the right to recover the full value of the life of the deceased, the rule adopted for estimating the damages to the wife when no fault was proven on the part of the deceased, was this: Inquire what would be a reasonable support, according to the circumstances in life of the husband, as they existed at his death, and as they may be reasonably expected to exist in view of his character, habits, occupation and prospects in life, and when the annual money value of that support has been found, to give, as damages, its present worth, according to the expectation of the life of the deceased, as ascertained by the mortuary tables of well-established reputation. *Johnson*, 38/409. Cited, 111/594. In a proper case the rule was

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amplified and attention called to the declining years of the deceased, and the probable decrease year by year of his capacity to labor at his calling. As in case of an engineer the jury should consider his age, and if old, his consequent incapacity to labor long. Roach, 64/635. If the husband was in fault, the amount to be lessened in proportion to his contributory negligence in causing his death. Ayers, 53/12. If the right of action survived to the children, the present worth of a reasonable support for them during minority was ascertained in the same way. David, 41/223.

408. Rule under Act of 1878.

The Act of 1878 [Code, § 4424 (3828)] is constitutional and it clearly gives the widow the right to recover the full value of the life of her husband for whose homicide she sues; and the jury are to determine the present value of that life. It was meant to remedy the rule formerly prescribed by the Supreme Court that the family could only recover the value of the life to it; that is, the annual support they would get out of his labor. Pittman, 73/325. Cited, 77/409.

In Flannagan, 82/579, a case that arose and was tried under the Act of 1878, the judge gave the railway company the full benefit of the rule for computing damages laid down in the Rouse case, *supra*, but went further and treated luxuries which the deceased was accustomed to enjoy as being a subject-matter for deduction, the same as necessary expenses. This was not only fair to the company, but liberal.

409. Rule under the Act of 1887.

Under the Act of 1887, which is codified in §§ 4424 (3828) and 4425 (3829) of the Code, the measure of damages is the full value of the life of the deceased as shown by the evidence, without deduction for necessary or other personal expenses of the deceased had he or she lived.

That the statute prescribes the measure of damages to be the full value of the life of the deceased, with no deduction for his necessary or personal expenses had he lived, does not render it unconstitutional. The legislature is not prohibited from prescribing a rule for the measure of damages. Clay, 84/345. Cited, 105/138.

The gross annual earnings is the measure under this law. Newton, 85/517.

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410. Value of the life of deceased.

In *Stewart*, 71/427, it was held by a majority of the court that there is no invariable rule for estimating the value of a man's life. Age, health, habits, money made by one's labor, furnish data from which such value may be decided by a jury. Tables of the probable length of life and its probable worth may be useful, but are not conclusive or absolutely essential for that purpose. Cited, 86/148; 96/524; 112/936; 8 G. A. 196.

Where the age of the person in question is shown, expectancy of life may be determined by the jury without having the mortality tables before them, or without any other direct evidence on the subject. *Moore*, 8 G. A. 185.

A jury, when there are sufficient facts in evidence as to the age, health, physical condition, habits, etc., of a given person, may form a reasonable estimate as to the value of the life of such person, without resorting to the mortality tables. *Simmons*, C. J., said: "It was not essential that the jury, in order to form an estimate as to the value of the life of the deceased, should have before them the standard mortality tables usually introduced in evidence in cases of this kind. On this subject, *Jackson*, C. J., speaking for a majority of the court in the case of *Stewart*, said: 'I do not think there is any Procrustean rule in the mode of estimating the value of a life. The age of a man, the health he enjoys, the money he is making by his labor, his habits, are data from which the jury may argue how long he will probably live and work, and what his life is worth in its pecuniary value. I know of no law which requires tables of the probable length of life and its probable worth to be introduced. They may be a useful circumstance, but are not conclusive or absolutely essential.' In the present case there was evidence that the deceased was thirty-eight or forty years old at the time of his death, and that, when he was sent to the chain-gang, he weighed one hundred and ninety-five pounds, was able-bodied, and, according to the testimony of several witnesses, was worth about \$100 a year as a laborer. This evidence furnished a sufficient basis for an estimate as to the probable value of the life of the deceased." *Boswell v. Barnhart*, 96/521. Cited, 102/161; 4 G. A. 669.

In his declining years, the capacity of the deceased to labor in his calling and his ability to earn money might have decreased;

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feebleness of health, actual sickness, the loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages, and other causes may contribute in greater or less degree to decrease the gross earnings of a lifetime, and a proper allowance should be made for any diminution in income from labor which would have resulted from any of these causes. Moore, 94/457; Burney, 98/1. Cited, 129/353; 4 G. A. 667.

In *Merchants & Miners Transportation Co. v. Corcoran*, 4 G. A. 667, Russell, J., said: "In Moores case, *supra*, it was held, in view of the facts of that particular case and the amount of the verdict, that there ought to be a new trial, for the reason that the court erred in omitting to call the attention of the jury to the fact that in his declining years the capacity of the deceased to labor and his ability to earn money might have decreased, and that they should take this into consideration. We do not know that this case is controlling, in view of prior adjudications, but in any event the ruling must be confined, as the Supreme Court confined it, to its particular facts." Cited, 8 G. A. 196.

The judge may refer, in his charge on the subject of estimating damages for the value of a life, to the decrease in the earning capacity which naturally results from advancing age, probable loss of employment, and inability to constantly labor, and secure continuous work. Juries are presumed to be as cognizant of the common phenomena of human experience as the judge; and if their attention is specially desired to be directed thereto, a timely written request should be made. Ray, 129/349. Cited, 4 G. A. 669.

In *Merchants & Miners Transportation Co. v. Corcoran*, 4 G. A. 654, it was held that in the absence of a written request it is not error for the court, after giving instructions upon the subject of the measure of damages, to omit to instruct them that they should take into consideration the plaintiff's diminishing capacity for labor, due to old age. If general instructions are given on the subject of the ascertainment of damages, more specific instructions, if desired, should be duly requested. The jury are presumed to be as cognizant of the common phenomena of human experience as the judge, and if their attention is especially desired to be directed thereto, a timely written request should be made. It is not essential, in order to form an estimate of the value of the life of a deceased, or to ascertain the diminished capacity of a plaintiff to earn money, which has been caused by an injury, that

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the jury trying the case should have before them the standard mortality tables. Such tables may be a useful circumstance, but are not conclusive. Russell, J., said: "When there are sufficient facts in the evidence as to the age, health, physical condition, habits, etc., of a given person, the jury may form a reasonable estimate of the value of his life, where death results, or of the diminished value of his services from the circumstances proved in his case, without resorting to the standard mortality tables usually introduced in cases of this kind." Citing *Boswell v. Barnhart*, and *Stewart* cases, *supra*.

The jury is not confined to any particular rule in measuring the value of a life. The life-tables are an aid to that end, but age, health, habits, and the money one is making, are also data from which a conclusion may be drawn. The tables prepared for life-insurance do not contemplate at all ability to work, and how long that ability will continue, and how much it will decrease as age increases, but those tables only calculate life's duration, however feeble and incapable of labor that life will be in old age. In an action by a widow for the homicide of her husband, it was error to charge the jury to calculate the value of the life of the deceased, with the sum or amount of his annual pecuniary value to the plaintiff and the number of years of his life-expectancy as a basis, and to omit entirely to submit to the jury the increasing incapacity of the deceased to work at his trade as a carpenter, or the decrease in ability to labor which age might cause. No arbitrary rule can be invoked to calculate such decrease in value, but the jury must approximate it from the facts before them; such as constitution, habits, heredity, and such experience of the effects of age on muscle, nerve and endurance, as they themselves have had or witnessed in their intercourse with men. *Thompson*, 76/771. Cited, 86/148.

In *Newton*, 85/517, it was held that the evidence showing that the deceased had been a farmer since arriving at years of maturity, and had never followed any other vocation, it was proper to prove his mental and physical capacity in order to show his ability to earn money as a farmer; but it was not admissible for witnesses to give their opinions as to the value of his services in occupations in which he had never engaged.

In *Jones*, 132/189, a widow sued to recover damages for the death of her husband, who was a locomotive engineer, and it was held that the court did not err in admitting in evidence the schedule

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of wages for enginemen and the time-table. This evidence was material, and should have been submitted to the jury for their consideration in their endeavors to fix the amount of damages allowable in the case. Beck, J., said: "If it were true, as is insisted by counsel for the defendant company, that it was not practical or possible for an engineer to make the run with freight-trains as frequently as the time-table would indicate, that was a matter of defense, which might have been established by competent evidence. Whether or not it was possible for an engineer to make the run between the two points designated in this time-table, as often as the table itself would seem to indicate, was a question for the jury. Under the evidence the table itself indicates that the run between those points might be made by an engineer daily. If, because of the physical strain entailed by the making of such a run, an engineer could not endure it for more than 12 or 14 days in each month, that might have been shown as a matter of defense; and in fact the defendant did introduce evidence tending to establish this defensive fact. Just what weight should have been given to that evidence was for determination by the jury. It was opinion evidence, and the jury, in determining its effect, had the right to look to all the facts and circumstances proved."

In Jones, 132/189, it was held that, evidence having been actually introduced to establish a certain fact, it was not error for the court to so state to the jury. Beck, J., said: "Evidence having been produced as to the age of the plaintiff and his life expectancy, and other evidence from which the jury could have found the probable amount of his annual earnings, it was not objectionable for the court to charge the jury, in effect, that evidence had been introduced as to what was the value of the life of the deceased. Such a charge did not fall within the inhibition contained in the statute against an expression or intimation by the court as to what had been proved."

The amount of his earnings, or the value of his life to his family, should be based upon his probable earnings in the profession or vocation which he had selected, or was permanently pursuing at the time of his death. Of course if the deceased were a child, or a young man who had not as yet selected a profession or vocation, the rule would be somewhat different. That laid down in Davis, 60/329, and in Young, 81/397, might then be proper.

Whether a person's capacity to earn money and labor successfully

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would be, depends considerably upon the character of the labor and the expectation of life of the person. Jackson, C. J., said: "So far as the plaintiff's business of taking the number of cars, making a memorandum of them in a book and reporting it, is concerned, he would last longer probably than one in more active and harder physical labor would retain the capacity to work; and his trading capacity, which seems from the evidence to have increased his salary from the company he served, would also endure longer than the capacity for hard labor. It is very questionable, to say the most for the plaintiff in error, whether a better mode of settling such questions could be desired than by referring them to the jury, under the facts of each case, in respect to the calling and sort of labor the deceased followed." Pittman, 73/325. Cited, 77/409.

In a suit to recover the value of a life alleged to have been destroyed by the negligence of the defendant, it is proper to prove what was the occupation of the deceased and the amount of money which he usually made, each year, in his business, in order to illustrate his earning capacity. Gornto, 129/204.

411. Subject continued.

There was no error in allowing the plaintiff to testify that her husband, after paying his "cab board," which amounted to \$5, brought her \$59 at the end of every month he was at work, and that he had no other means or resources except his wages; the evidence being offered to show what were the earnings of the deceased, and the objection being that the amount turned over to the plaintiff by her husband at the end of the month was no standard by which to measure his earnings. Moore, 94/457.

Where the value of a life terminated by violence is to be ascertained, evidence that the deceased person had engaged at different times in various pursuits, and of what he made or was capable of making in each of these, is relevant, although at the time of his death he had ceased for a number of years to act in one of them, his capacity to pursue it not being injured. What he had earned in it would not serve as a direct basis for estimating the value of the life, but might be looked to by the jury in estimating his capacity to command continuous, profitable employment should he cease to pursue the business vocation in which he was engaged when he was killed. Evidence that at that time he held the offices of postmaster

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and tax-collector, and of the amount of his income from the same, would also be relevant to show pecuniary loss for the unexpired term of office, but not to furnish a basis of direct computation for any longer period. Christian, 90/124.

In Newton, 85/517, it was held that in using life-tables as a basis for calculation of the value of the life of the deceased, the gross value when ascertained must be reduced to its present value to find the sum to be paid to the plaintiff, his widow. If the expectancy of her husband's life be twelve years, the verdict should be for a sum not larger than would be exhausted at the end of that time by expending each year a sum equal to his net earnings, the homicide having occurred before the passage of the statute forbidding any deduction for his expenses. Simmons, J., said: "The rule as laid down by the court, at the suggestion of plaintiff's counsel, was the rule to ascertain the gross amount of the value of the life, when the court should have gone further, and instructed the jury that, after finding this gross amount, they should reduce it to its present value. The rule as given would show what amount the deceased would have earned, or been entitled to, if he had lived to the time the mortuary tables show his expectancy to be, and had waited for the money until he had earned it; but as the money recovered by the widow must be paid to her at once, this gross amount should be reduced to its present value. The amount of this verdict, if put at interest at seven per cent., would give to this widow a sum greater per annum than any amount of earnings which her husband could have made if he had lived, even admitting the guessing and speculative opinions of the witnesses. The amount of the verdict, at seven per cent. interest, would give her \$672 per annum, and, at the end of the twelve years, the expectancy of the life of her husband, she will have had this \$672 annually, for that whole length of time, and the amount of the verdict \$9,600, still in her hands; whereas, the jury should have given her a sum that would be exhausted at the end of twelve years, by expending each year an amount equal to the net annual earnings of the husband. Such would be the full value of his life. This death occurred before the Act of 1887, which forbids any deduction for the husband's expenses. Of course, the gross annual earnings will be the measure in cases falling under this act."

In Perkerson, 112/923, it was ruled that in an action for the homicide of a railroad employee, proof of his usual earnings as such employee, within a reasonable period of time prior to his death, is

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admissible. There is no arbitrary rule which confines the proof upon this point to what he was actually earning at the very time of his death. Fish, J., said: "It is pretty well established that in proving the value of the life of a deceased employee it is not competent to prove that he was in the line of promotion in his calling, and the increased rate of wages which he would have received if promoted. 8 Am. & Eng. Enc. Law (2d ed.), 943, and cases cited. See, also, Allison, 86/145. The reason for the rule is that the chances for promotion are too remote, and dependent upon too many contingencies to be considered. 8 Am. & Eng. Enc. Law (2d ed.), 943. It is, however, competent to prove what were the accustomed earnings of the deceased. Abb. Tr. Ev. (2d ed.) 758; Railroad Co. v. Clarke, 152 U. S. 230, 14 Sup. Ct. 579, 38 L. Ed. 422; McIntyre v. Railroad Co., 37 N. Y. 287, 35 How. Prac. 36. The apparent reason for this rule is that what a man usually earned, within a reasonable period of time prior to his death, is about as reliable data upon which to estimate what his probable future earnings would have been, had he lived, as can be found. It is not permissible to prove what the deceased could have earned in a calling in which he had never engaged, but for which, in the opinion of witnesses, he was well qualified. Nor, as we have seen, in the case of an employee to prove that there were chances of promotion in the service in which he was engaged, and what his earnings would have been if he had lived and been promoted to a more remunerative position than he had ever held. The proof is not allowed to enter the domain of pure conjecture or speculation. But it does not follow from this that proof of what a railroad employee earned up to a short while before his death, in his chosen calling, is to be excluded because at the very time of his death he was not filling the particular position or positions in which these earnings were made. Demonstrated skill and capacity are one thing; conjectural skill and capacity are another thing. Proof of wages actually earned and received by an employee in a nonpolitical position, for which he had demonstrated his fitness, which go to make up his average earnings, within a reasonable period of time prior to his death, is different from proof of his probable chances, had he survived, to be promoted to a better position than he had ever occupied, and for which he had not demonstrated his fitness, in which he could have earned higher wages than he had ever done in the past. In the one case the proof deals with established facts and demonstrated capacity; in the other it has to

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do with imaginary facts and speculative capacity. In the one case the proof shows what a man has actually earned; in the other it shows what, under speculative contingencies, he could earn. What were this young man's accustomed earnings? What was his demonstrated capacity to earn money? It seems to us that there are questions which a jury could properly consider, along with others involving his age, his health, his habits, his expectancy of life, etc., in determining the financial value of his life."

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CHAPTER 21.

TORTS TO WIFE OR CHILD.

- 412. Right of action conferred.
- 413. Torts to child, loss of service gist of the action.
- 414. Action against physicians for negligence.
- 415. Infant must be capable of rendering service at the time of the injury.
- 416. Where child was in the chain-gang at the time of the injury.
- 417. Negligence of the father as a defense.
- 418. Where not necessary for father to allege that he or son was free from fault.
- 419. Diligence of child.
- 420. Diligence of factory superintendent.
- 421. Where wife may sue.
- 422. Action for injury to wife's person.
- 423. Emancipation of child.
- 424. Damages computed for remnant of minority.
- 425. Expenses may be recovered.
- 426. Rights of father not the same as minor's rights.

412. Right of action conferred.

Section 4412 (3816) of the Code declares that every person may recover for torts committed to himself, or his wife, or his child, or his ward, or his servant.

The torts contemplated by this section are the class of torts for which damages could have been recovered at common law for loss of services of the wife, child, ward, or servant. Chick, 57/360. The section should be construed in the light of the common law of force in this State, as it is declaratory of that law. Allen, 54/505; Bell, 73/521; Frazier, 101/72.

By the common law a father may sue for injuries to his minor son, as for injuries to a servant, if the son is old enough to render services. Shields, 15/349. Cited, 53/685; 54/505; 57/358; 60/321; 64/476; 100/47; 104/811.

The father may sue for any trespass done or damage sustained whereby he loses the services of the child, as also for any expense incurred resulting from such injury. Brinson, 64/475. Cited, 87/710.

Where a father hires his minor son to an employer to do certain work, and the employer, without the father's consent, puts the son

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to a different and more dangerous employment, and the latter is injured, the father has a cause of action against the employer for the recovery of such diminution in the value of the child's prospective services, between the date of the injury and the date of his attaining his majority, as the injury may have occasioned. *Braswell v. Garfield Cotton Oil Mill Co.*, 7 G. A. 167.

For a negligent injury to a minor, causing loss of services and entailing expenses of medicine and nursing, the right of action is in the father, if he be alive at the time of the injury. If for such a tort a right of action accrued, it did so immediately upon the happening of the injury, and was in the father, although he may have been injured at the same time with the child, and may have lived only a short time thereafter. In such a case, if a right of action arose to the father, and he died before any suit was brought, the cause of action did not survive to the mother of the child. *King*, 126/794.

In *Flemister*, 120/524, it was held that a father loses the right to sue for and recover the value of his minor child's services by voluntarily releasing his parental control to a third person, or by failing to provide for his or her maintenance. The evidence demanded a finding that the plaintiff had lost all parental control over his child in both of the ways indicated in the preceding note. *Cobb, J.*, said: The code provides that until majority a father is entitled to the services of his child and the proceeds of his labor; and that this parental power is lost '(1) by voluntary contract, releasing the right to a third person; (2) by consenting to the adoption of the child by a third person; (3) by the failure of the father to provide necessities for his child, or his abandonment;' and by other acts of the father not necessary to be specially alluded to here. Code, § 3021 (2502). The grandmother of the deceased child, whose name was Mary, testified as follows: 'I was Mary's grandmother. Her mother gave her to me on her deathbed when Mary was about two years old. Her mother told me to take her little children, Matilda, Mary, and Lige, and keep them and care for them until they were grown. Her husband was there at the deathbed at the time, and gave his consent. After my daughter's death I took them. Matilda was four years old, and Lige was six months old. I kept Mary from that time until her death. I fed her and lodged her and clothed and nursed her when she was sick. I would dress her in the morning and put her to bed at night. I did everything for her.

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Robert Flemister, her father, did not do anything for her, or any of his children, from the time his wife died. He did not look after them. Robert Flemister did not stay at my house. He gave these children to me, and I was to keep them until they got grown. * * * Her father Robert Flemister did not contribute anything to her maintenance or support. He did not exercise any authority over her, nor do anything for her. My daughter Cely gave me that child, and Robert was willing to it.' This evidence was substantiated in every material particular by that of the grandfather, who also testified that about a year before the child's death the father went away and nothing was heard from him until some time after she was killed. The father was not at the trial, and the two witnesses above referred to testified that they did not know his whereabouts. None of the evidence above set out was contradicted in any material particular. It demanded a finding that the father had released all parental control over the child both by voluntary contract and by failing to provide for the child for five years. Having released all parental control and all right to the services of his child, the father necessarily lost the right to sue for and recover the value of such services. Smith, 93 G. A. 742. It follows that a new trial should have been granted. As the plaintiff would not have been entitled to recover had he been suing for his own benefit, no recovery could be had by him for the benefit of his attorney. Owens, 119/833."

413. Torts to child, loss of service gist of the action.

The loss of the services of the child by the parent is the gist, the essential ground or object of the action in point of law, without which there would be no cause of action. The wrong consists in actual damage by reason of loss of service, or capacity to serve. While to recover it is necessary to show both the negligent injury or homicide, and loss of service, the latter being the source of damage as to the father, is the gist of the action, and the rights of the parties are to be established by the law applicable under such circumstances in the relation of master and servant. Allen, 54/505. Cited, 87/710; 104/811; 100/47; 101/70.

Accordingly, it must be alleged and shown that the homicide—in case of homicide—resulted in loss to the parent of the services of the child. If the declaration merely alleges that the minor child has been killed by the carelessness and negligence of the railroad com-

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pany, whereby the plaintiff is damaged, no cause of action is set out and there is nothing to amend by. *Bell*, 73/520. And when the action was by a mother and the declaration counted apparently on the homicide, and not on the loss of service, as the grievance to be redressed and there being no claim of right in the mother to the son's service or to recover hire for it, the declaration was treated as not amendable. *Smith*, 84/183. Cited, 5 G. A. 456.

Where plaintiff's declaration claimed damages for the loss of services of her minor son, who was injured on defendant's road, the further allegation, by way of showing the aggravated nature of the case, that death resulted from such injuries, does not change the nature of the action so as to make it a suit for the homicide of the son. For the former she could recover; for the latter she could not. *Chick*, 57/357.

In *Davis v. Augusta Factory*, 87/648, the plaintiff's daughter was fifteen years of age. Through the negligence of defendant, in furnishing unsafe machinery for her to work with in its cotton-mill, she was injured and died of the injury. The action was for the loss of her labor and services, and for expenses incurred in her last illness, death and burial. It was held that a father may recover damages against the wrong-doer for loss of labor and services of his minor child, and for burial and other expenses incurred on account of the negligent homicide of the child, such child being old enough to perform labor, and having lived for several days after the infliction of the injury resulting in death.

414. Action against physicians for negligence.

Bell v. Wooten, 53/684, was an action brought against the defendants as physicians and surgeons for so unskillfully and negligently amputating the leg of the plaintiff's son as to cause death. It was not alleged that the son was a minor and that plaintiff was entitled to his services as such minor, and therefore no sufficient cause of action was shown. A parent can not recover for the homicide of his son without alleging facts showing pecuniary damage to have been sustained by him.

415. Infant must be capable of rendering service at the time of the injury.

The loss of service being the cause of action, it follows that if the infant is incapable of rendering service at the time of the injury, the

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parent can not recover. In *Shields*, 15/349, the boy was eighteen years of age; in *McDowell*, 60/320, the girl was eighteen; in *Chick*, 60/357, the boy was twenty years of age; in *Frazier*, 101/70, the boy was fourteen years of age; in *Maloy*, 77/237, the boy was twenty years of age, and, in them all, recoveries were allowed. In *Allen*, 54/503, the boy was two years old and a demurrer to the declaration was sustained on the ground that he was incapable of rendering service at the time of the injury.

In *Sugarman*, 94/604, the child was not quite five years old. The suit was to recover for her services during minority, and the declaration alleged that, "As she advanced in years her services would have become of great value to the father," though it did not distinctly aver that at the time of the killing the child was capable of rendering services of any value. An amendment was allowed alleging that the child was old enough to render, and did in fact render, certain specified services, and the same were, at the time of her death, of a stated value per month. Cited, 106/879.

In *Convenia*, 100/46, it was held that although the declaration stated facts showing the tortious killing of the plaintiff's child by the defendant, and alleged that the child "was a boy well formed, precocious, and of strong and robust physical powers for a child of his age; that he was physically sound in every respect, and was capable of rendering, and did render, to the plaintiff valuable services, by going upon errands to neighbors residing near to plaintiff's residence, picking up and bringing in coal and chips to make and keep burning fires in the house, bringing the broom and other articles used in house-cleaning to his mother, picking up and carrying out of the house trash and litter which tended to render untidy in appearance plaintiff's home, watching and amusing plaintiff's younger child while his wife was engaged in cooking and attending to her household duties; and that these services were worth to the plaintiff the sum of two dollars per month"—no cause of action entitling the plaintiff to recover for the child's services was set forth, it being also alleged in the declaration that the child was only one year, eight months, and ten days old. The allegations of the declaration should be construed all together, and the courts will take judicial cognizance of the fact that an infant of this age is incapable of rendering valuable services. *Simmons, C. J.*, said: "In the case of *Minnesota v. Barber*, 136 U. S. 321, 10 Sup. Ct. 862, Mr. Justice Harlan said: 'If a fact alleged to exist, upon which the rights of parties depend, is

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within common experience and knowledge, it is one of which the courts will take judicial notice.' In *Ho Ah Kow v. Nunan*, 5 Sawy. 560, Fed. Cas. 6546, Mr. Justice Field said, 'We can not shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench, we are not struck with blindness, and forbidden to know as judges what we see as men.' In the case of *King v. Gallun*, 109 U. S. 99, 3 Sup. Ct. 85, it was held that 'the court will take judicial notice of matters of common knowledge, and of things in common use.' 'Courts will take judicial notice of facts generally known as of uniform occurrence, or the invariable action of natural laws.' 12 Am. & Eng. Enc. Law, p. 196. The fact that a child of less than two years of age can not perform any services of value to its parent is a matter of common knowledge to all men. It is as well known to the judge as it is to the jury. It being so known to the judge, why should he not act upon it, when he is called upon to do so by proper pleading? Why is he less qualified than the jury to declare a well-known fact? Why should he submit such a question to a jury, when, if they found contrary to this well-known fact, he would be compelled to set aside their verdict? Why should he go through the farce of a trial, at the expense of the country in time and money, in order to have a jury decide a fact which is already well known to every one? There is no necessity for a jury trial when there is no issue of fact. In our opinion, there can be no issue of fact as to the ability of a child two years old to perform valuable services. Even if the parent should testify that a child of that age could render services of the value of two dollars per month, it would be so inconsistent with every person's knowledge of the incapacity of children of that age to render service that such testimony would be unworthy of credit. In the case of *Hall v. Hollander*, 10 E. C. L. 746, 4 Barn. & C. 660, Bayley, J., in discussing an injury to a child two and a half years old, said: 'It is manifest that the child was incapable of performing any service.' Atkinson, J., dissenting. Cited, 100/566; 106/878.

In *Arnold*, 100/566, where the child was between two and a half and three years of age, the decision in *Covenia*, *supra*, was adhered to, and Fish, J., said: "The difference in the ages of the children in the two cases is not sufficient to authorize the application to this case of a principle different from one which controlled the decision in the other. The reasons given by Chief Justice Simmons, in the opinion in the *Covenia* case, for taking judicial cognizance of the

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fact that a child less than two years old is incapable of rendering 'such services as would authorize the parent to recover' for the loss of them, are equally applicable in a case where the child for whose death a recovery is sought is alleged to have been between two and a half and three years of age. It follows that the court erred in not sustaining the demurrer to the declaration." Cited, 106/878.

In *Crawford*, 106/870, the child was four and a half years old and it was held that the question whether a particular child of such age was capable of rendering any valuable service to its father should be left to a jury to determine, in the light of the evidence submitted upon the point. *Fish, J.*, said: "Because a child is too young to exercise any care for its own safety, we do not think it necessarily follows that it can not render any services of value to its parents. It is easy enough for a court to decide, as a matter of law, that any child of a given age is incapable of rendering valuable services, notwithstanding the allegations of a petition may be to the contrary, where the age in question is such that, according to all human observation and experience, it would be utterly preposterous to believe that a child who had not passed beyond that age could render such services. For instance, no sensible man believes that any child only a year old can perform service of value to its parents. But by gradually increasing the age we must sooner or later arrive at an age which is debatable ground—where reasonable minds will differ in opinion upon the question whether any child of that particular age can render service of pecuniary worth. Just when that debatable ground will be reached it is, in the very nature of things, impossible to determine. When the line is reached where it seems possible that reasonable minds may begin to differ upon this question, the only safe course for a court to pursue is to leave the determination of the question to a jury."

416. Where child was in the chain-gang at the time of the injury.

In *Amos*, 104/809, it was held that a tortious act which deprives a minor of his ability to render valuable services will give the parent a right of action against the wrong-doer, although such tort may result in the death of the minor, and although at the time of the injury he may be serving, for a violation of a penal law, a term in the chain-gang, which expires in a short time, and before his ma-

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jority. Lewis, J., said: "It is insisted that, inasmuch as the injury to the child occurred at a time when its services could not be commanded by the parent, there can be no recovery, and the decision of this court in the case of *Smith v. Hatcher*, *supra*, is relied on to sustain this position. In that case the suit for the homicide of the child, based upon a new right given by statute to the parent which did not exist at common law. Under the Code, § 4424 (3828) the right is founded upon the dependency of the parent on the child at the time of the injury, and, further, upon the fact that the child was contributing to the support of the parent. The decision of the court is expressly founded on the use in the statute of the words 'is' and 'contributes,' in the present tense, the court simply ruling that, under the statute as construed, the parent must at the very time of the injury be dependent upon the child, and the child at such time must be actually contributing to the parent's support. The action in the case now under review, however, is not founded upon this statute, but upon principles of the common law, and hence the decision above cited in nowise conflicts with the principles herein announced. Nor is the decision in the case of *Allen*, *supra*, in point. That was an action by a father for damages on account of the homicide of his infant child, and the decision was based upon the idea that the child, on account of its infancy, was at the time incapable of rendering any service. There is sound reason for that rule. It would be a matter of mere speculation as to when an infant, if ever, would reach an age when it could render service; and, even if it should reach that period in its life when it would be old enough to work, the value of such services would depend upon the contingencies of mental and physical development, which could not be foreseen. In order to maintain this action, it is necessary that the child at the time of its injury should be actually capable of rendering service to the plaintiff. The contrary rule seems also to have prevailed in England, but in this country the decisions have been more liberal to the parent, and it is enough that the parent retains the right to claim the services of the child. 17 Am. & Eng. Enc. Law, pp. 385, 386. In the case of *Shields*, *supra*, Benning, J., says: 'May a father treat his minor son as his servant, and sue for an injury to the son, as for an injury to a servant? If the son be old enough to render service, the father may.' To use an illustration presented in the argument of counsel for plaintiff in error: Suppose a child eighteen years of age is attending college, and is a

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positive expense to his parent, and renders no service whatever; we apprehend it would not be seriously contended that there could be no recovery by the parent for an injury to him. Or suppose the child should have a spell of illness for several months, and while in that condition should receive an injury, when at the time it was unable to render service on account of sickness; certainly this condition could not operate as a bar to the parent's right of action. Neither would it affect the right of a parent to have redress for such injuries because the child is at the time temporarily engaged in the service of another. In 1 Jagg. Torts, pp. 451, 452, the rule is expressed in the following language: 'It is not necessary to show that the child rendered valuable services. Pouring tea or milking cows has been held to be an act of service. Services may continue, notwithstanding a temporary absence. Even a married daughter living apart from her husband may, in this sense, render services to her father. Proof of actual service of an infant is unnecessary. Right to service is enough. If the child is of age, there must have been loss of service to entitle the parent to recover. The legal right of the parent at the time to command the service of the child, though she resides and is temporarily employed elsewhere, is sufficient. It rests on his legal obligation to provide for her support and education, and his consequent right to the profits of her labor. This fiction of service as a basis of the right of the parent to sue for wrongs done the child is generally recognized in America, although much criticised.'” Cited, 7 G. A. 169.

417. Negligence of the father a defense.

In Hooper, 112/96, the plaintiff sued for injuries to his minor son, and he alleged: “Defendant's railroad runs through petitioner's farm. There is also a wagon-road running through said farm, and crossing defendant's railway upon said farm. As the wagon-road approaches the railroad, it passes over a bridge built by defendant over one of its ditches. The bridge forms a part of the approach to the railroad, and is entirely upon defendant's right of way. This wagon-road has been in constant use by the public, and has been recognized and kept up by defendant for twenty years or more.” He then alleged that the defendant negligently allowed the bridge to become rotten and unsafe, which caused the injury. The trial judge gave charges which, in substance, laid down the rule that a father who used, or permitted his minor son to use, a given bridge,

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with full knowledge of specified defects therein, could not recover for injuries occasioned solely by reason thereof, and they were approved.

418. Where not necessary for father to allege that he or son was free from fault.

Negligence of the railroad company being presumed when injury by the running of its train is shown, it is not necessary for a father, suing for loss of the services of his minor son, not an employee of the company, who was killed on a public crossing, to allege in his declaration either that he or the son was in the exercise of due care, or was without fault. Lumpkin, J., said: "If the deceased was in fault, or could by the exercise of reasonable care have avoided the injury, these were matters of defense. Deer. Neg. § 400; 3 Lawson, Rights, Rem. & Pr. § 1216; Pierce, R. R. 322. The foregoing authorities sustain the above rulings, though they show also that, if the declaration itself alleges facts from which consent to the injury, negligence on the part of the person injured, or failure on his part to exercise due care to avoid the consequences of defendant's negligence may be inferred, then the declaration must go further, and avoid or explain such facts, and make defendant's liability appear notwithstanding the same. The presumption under our Code being against the railroad, if injury and negligence by defendant are clearly set forth, the declaration is sufficient, as to these points, and need not, when the plaintiff or person injured is not an employee of the company, further allege diligence or freedom from negligence on the part of such plaintiff or person injured, unless the declaration itself contains averments tending to relieve defendant of the legal presumption against it." Evans, 87/673. Cited, 135/637.

419. Diligence of child.

Where the rule of a railroad company provided that while a coupler was between the cars, the train should not be put in motion, a coupler so engaged had the right to presume that it would not be moved, and that he could pass between the projecting beams of the cars, which he could have done if the train had not been moved; and if, while so passing out, under a signal given by another servant of the company, the engineer backed the train, and the coupler was caught between the projecting beams and crushed to death, if he

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were a minor, his father could recover for the loss of his services; and a recovery would not be prevented by the fact that the deceased might have passed under the beams in safety by stooping. *Harrison*, 73/744.

Whether after notice from a parent to a railroad company not to employ her minor son, but it does so and the minor is injured while in such employment, the company can plead his negligence in defense to an action for the injury brought by the parent, becomes immaterial, if the parent allege that the minor was injured through no fault of his own, and the cause be tried upon this issue mainly. *Hunnicut*, 85/195.

Under the declaration and the evidence, this case should have turned, as to the question of the defendant's liability, upon whether the conductor ordered the plaintiff's daughter to jump from the train while in motion; and, if so, whether the daughter was free from plain, and manifest fault in obeying the order. If the order was not given, or if it should have been disobeyed on account of the obvious danger of complying with it, there could be no recovery; otherwise there could be a recovery, measured by the loss of services, reduced to their present net value, from the time of the injury up to the time when the daughter would attain her majority, to which should be added any expense to the plaintiff occasioned by the injury. As the daughter was about seventeen years of age, she should not be treated, with respect to her duty to care for her own safety, as a child of "tender years," but should be treated as a person who is presumptively chargeable with the exercise of the ordinary discretion possessed by young persons of her class and condition. *Hughes*, 92/388. Cited, 97/381; 107/138.

420. Diligence of factory superintendent.

Although an infant employee in a factory may not have been in the line of her duty at the time of an injury to her, yet if she was set to work upon a particular frame, and what she did in cleaning the machinery was done under the direction of the superintendent of the work, and he did not forbid her engaging therein, he was bound to ordinary diligence in supervising her conduct, and if necessary to her protection, he not only might use coercion to restrain her from risk and exposure, but it was his duty to do so, and for neglecting his obligation in this respect his principal would be responsible. Sections 3141 (2619) and 3142 (2620) of the Code, do

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not lessen the obligation of the employer to look to the safety and protection of the minor operative, or interfere with the right of the parent to the earnings of his minor child, but afford another safeguard against the personal abuse of the minor by limiting the authority over him so far as they express, but no further. *Augusta Factory v. Barnes*, 72/217.

421. When wife may sue.

A wife, while living in a state of separation from her husband, who has abandoned and failed to provide for her and their minor child, having the entire care and custody of the child, is entitled to maintain an action against a railway company for injuries negligently inflicted upon the child since the separation took place, by reason of which she is deprived of his services. *Smith*, 93/742. Cited, 104/814; 126/797.

A mother has a right of action for such a tort when the father has abandoned his family and all custody and control of the minor. The allegation in this petition of such abandonment by the father is sufficient as against a general demurrer. *Lewis, J.*, said: "It is further insisted by counsel for defendant in error that the declaration in this case does not sufficiently show that the mother, instead of the father, had a right of action for this injury to her son. Under § 2994 (2475) of the Code, it is declared that 'if the wife is living separate from the husband, she may sue for such torts, and also torts to her children, and recover the same to her use.' The petition alleges that the father had deserted the mother long ago; that, before the injury to her child, she had received his services, and would have continued to receive them had he not been injured. This allegation, under the statute, is certainly sufficient, in the absence of a special demurrer. The statute only requires the wife to be living separate from the husband in order to give her the right of action; and we see no other construction that can be reasonably put upon the words of the petition except that the pleader meant this state of separation existed at the time of the commission of the tort and the bringing of the action." *Amos*, 104/809.

In *Maloy*, 77/237, it was held that where a husband and wife are living separately, and the wife was using the wages of her minor son for the support of herself and her minor children, a suit for his homicide, brought by her in her own name and in the name of her

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husband for her use, could be maintained. Her declaration alleged that he was supporting her as well as three other minor children, that his services were due to her and were of the annual value of six hundred dollars. The court meant that there could be a recovery for the loss of his services resulting from the homicide, according to the distinction in Chick's case. Smith, 84/185. Cited, 85/195.

422. Action for injury to wife's person.

In an action brought by husband and wife to recover for an injury to her by reason of a road-crossing being out of order, it was held that § 4412 (3816) which prescribes that the husband may recover for torts committed on the wife, does not repeal the common-law rule of pleading, that the wife should be joined in the action. In such suits the husband may join the wife. But when recovered by that mode of suit, the amount is hers. Cox, 57/252. Cited, 73/480.

In the absence of any consent or agreement, either expressed or implied, on the part of the husband that the earnings of the wife shall be retained by her as her separate estate, they belong to him. The damages that may be recovered by the husband for the loss of the services of his wife by reason of personal injuries are not confined to the value of her services in the household, but may include the value of her services rendered in her husband's business, where she was thus engaged at the time of the injury without any contract or expectation of pay for the same. Tice, 124/459. Cited, 134/819.

In Stephens, 134/818, it was held that where a married woman died after having instituted her suit to recover damages for pain and suffering resulting from personal injuries, and one duly appointed as administrator of her estate was made a party to the case, and the cause was ordered to proceed in his name as plaintiff, the case should not have been nonsuited on the trial, where the evidence made a prima facie case against the defendant, on the ground that the administrator was not a proper party to the case and that upon the death of the original plaintiff there was "a right of survivorship" in the husband. Beck, J., said: "Under such a state of facts two different causes of action may arise,—the one in favor of the woman for her own pain and suffering, and the other in favor of the husband for the loss of his wife's services and the

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expenses incurred, if any, as the consequence of the injuries to her. These causes of action are separate and distinct, and in favor of different parties, and could not properly be joined in one suit. *Tice*, 124/459 (52 S. E. 916). This suit was instituted by the woman to recover for pain and suffering. To that action she was a necessary and the only necessary party, and at her death there was no other party in whom was vested the right of survivorship. If the husband had been originally joined with the wife in this suit, construing it as one to recover for pain and suffering only (for the allegations as to loss of earning capacity and as to the permanency of the injuries are incident to the allegations of pain and suffering), in case of the wife's death the right of action could not have survived to the husband, but the action could have proceeded only in the name of a duly appointed personal representative of the wife. We do not think that any right of survivorship which would authorize the husband to proceed with this suit could be inferred from the provision contained in § 4424 (3828) of the Code. The right of survivorship there referred to arises in cases where, under the provision of the statute just quoted, the husband and a child or children are properly joined as plaintiffs in a suit brought to recover the "full value" of the life of the deceased, where the deceased is a married woman leaving husband and children at the time of her death tortiously caused. In such a suit as that last supposed, there could be no recovery for that which constitutes the sole ground of recovery in the case at bar, to wit: pain and suffering inflicted upon the deceased."

And a wife, although living with her husband, may sue and recover in her own name for a tort committed to her person causing special injury to her. This suit was brought for damages for injuries caused by falling into an opening in the sidewalk on a street. *Dorsey v. City of Atlanta*, 73/479. Cited, 89/829; 111/870.

In an action by a husband for loss of his wife's services, occasioned by a tortious personal injury to her, he can recover the reasonable value of such services as have been lost to him from the time of the injury to the date of trial; and in calculating the amount the jury may take into consideration the nature of the services, and all the circumstances of the case. There need be no direct or express evidence of value, either by the day, week, month, or any other period of time, or of any aggregate sum. The peculiar relation which the wife sustains to her husband and his household takes

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her services out of the rules of law which apply to computing the value of services rendered by hirelings or ordinary servants. Bleckley, C. J., said: "Without adjudicating the question, we will observe that our present opinion is that the court could have gone further in respect to time, so as to embrace any loss of service which would be reasonably certain to occur on account of the injury after the trial and during the probable existence of the coverture, the probable duration being measured by the continuance, according to the mortuary tables, of the joint lives of the matrimonial pair. Nor did the court err in charging that in calculating the amount of the damages the jury could take into consideration the nature of the wife's services, and all the circumstances of the case. When the loss of a wife's services, resulting from a personal injury to her, is to be compensated for, she is not to be treated as an ordinary servant or as a mere hireling. Cooley, Torts, § 226; *Railroad Co. v. Goodman*, 62 Pa. St. 329. She sustains to her husband and his household a relation special and peculiar. Her place can not be supplied. No other is capable of filling it. Some wives perform manual labor, others do not; yet the husbands of the latter, no less than those of the former, would certainly be entitled to compensation from wrong-doers for causing inability to perform service. The actual facts and circumstances of each case should guide the jury in estimating for themselves, in the light of their own observation and experience, and to the satisfaction of their own consciences, the amount which would fairly and justly compensate the plaintiff for his loss. Certainly some elements of loss, such as manual labor, would be subject to estimation by witnesses; and, if evidence of this kind were produced, of course the jury should consider it together with the other facts. But what we hold distinctly is that there need be no direct or express evidence of the value of the wife's services, either by the day, week, month, or any other period of time, or of any aggregate sum. The court committed no error in denying a new trial." Johnson, 91/466.

In its charge upon the measure of damages, the court erred in omitting to call the attention of the jury to the fact that in his declining years the capacity of the deceased to labor in his calling, and his ability to earn money, might have decreased, and that they should take this into consideration in fixing the amount of the damages. In view of the facts of this case and the amount of the verdict rendered, there ought to be a new trial because of this error. Moore, 94/457. Cited, 124/459.

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423. Emancipation of child.

In an action by a father for an injury to his minor daughter, defendant contended that the father had emancipated her from his control and that he had relinquished all right to her earnings, and in support of the contention proved that the daughter received her weekly wages from defendant; that they were always paid to her and never to the father, and that the rent of the house which his family occupied was paid from this source. In rebuttal of this, it was admissible to show that she regularly accounted for and paid to him her wages. *Augusta Factory v. Barnes*, 72/217.

In the absence of any issue made by the pleadings, and of any request to charge on the subject, it was not error in the court to fail to instruct the jury that the minor son would not be entitled to recover any damages for reduced earnings between the time of his injuries and his majority, unless he proved manumission by his father, when the undisputed evidence showed that the minor son had been allowed by his father to leave home, to accept employment elsewhere, and to use the entire proceeds of his labor in his own support; and especially is this true where the father is suing to recover these damages for the use of his son, and not for himself. *Vale Royal Manufacturing Co. v. Bradley*, 8 G. A. 483.

424. Damages computed for remnant of minority.

In *McDowell*, 60/320, it was held that a father can not recover for the homicide of his minor daughter, but may recover for the loss of her services to the time of her majority. *Warner*, C. J., said: "Under § 3021 (2502) of the Code the child remains under the control of the father, who is entitled to his services and the proceeds of his labor. The plaintiff's daughter was of sufficient age to have performed service at the time of the injury, and he was entitled to her service until she became twenty-one years of age. This case comes within the ruling in *Chick's case*, which was based on the unanimous opinion in *Shield's case*." Cited, 87/650; 101/73; 104/811.

It would seem that the damages recoverable for loss of labor and services might be computed for the whole remnant of minority, though the mother of the child be living, and might, under the Act of 1887, have a right of action for the homicide; the father's action not being brought for the homicide, but for the loss of labor

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and services, caused by the wrongful negligence of which death was one of the consequences. Bleckley, C. J., said: "This action not being for the homicide of the daughter, but for the tort of which the homicide was only a consequence, and the gist of the suit being the loss of labor and services, the right of action was altogether independent of the Code, § 4425 (3829) and the recovery would embrace damages for the loss of services of the daughter from the time of the injury until she would have been twenty-one years of age, according to the ruling of this court in McDowell, *supra*. Inasmuch as one and the same tortious act may cause separate and distinct damage to two persons—as, for instance, to master and servant (Smith, Mast. & Serv. 173)—it is not easy to see how the scope of the father's damage, as recognized prior to the Act of 1887, would be contracted by the right of action given by that act to the mother, even where the conditions are such as to entitle the mother to sue and recover for the homicide. Her damages are arbitrarily measured by the statute at the full value of the life of the child; but this is not necessarily inconsistent with the duty on the part of the wrong-doer of compensating the father, on the basis of the prior law, for the damages sustained by him in the loss of the child's services up to the period of majority, in so far as those services would have been of value to him. The tort, with the homicide as an incident, might be treated as furnishing a cause of action to the father, and the homicide itself as furnishing a cause of action in behalf of the mother. In prescribing a measure of recovery for the latter, the legislature could make the value of the life the standard, without changing or intending to change the measure of recovery for the former. It does not appear, however, that the child now in question left any mother; nor was it needful that the declaration should disclose anything on that subject, the present action not being founded on the Act of 1887, but on the prior law. The contention that the prior law has been abrogated by implication is not sustainable, though it is doubtless true that a father, when himself entitled to sue under the new act, would have to elect between the remedy which it affords and the more restricted remedy afforded by the law as it stood before the act was passed. He could not sue severally for the homicide and for the original tort from which the homicide resulted and recover in both actions." *Davis v. Factory*, 87/648. Cited, 92/143.

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425. Expenses may be recovered.

Although the parent can not recover damages for the death of or injury to his child unless the child was capable of rendering services, he can recover the expenses necessarily and reasonably incurred in the burial of the child, including compensation for the loss of such time on the father's part, as was needed for the purpose. *Covenia*, 100/46. And also any expense incurred in and about the healing and restoring the child to health. *Brinson*, 64/476.

In *Douglass*, 94/547, it appeared that the minor son, for whose homicide the suit was brought, was a "hostler" to carry engines to and from a coal-chute. Plaintiff's testimony tended to show that the derailment was caused by a defective track and that deceased was without fault. Defendant's testimony was to the effect that the track was in good condition and that the train was running at an unsafe speed. It was held that the action being by a father for loss of service of his minor son, who died in consequence of an injury received while running a train as locomotive-engineer, and the evidence suggesting that if the accident occurred from fast running by the deceased, who was a youth between seventeen and eighteen years of age, his immediate superior, who was on the train at the time, and whose failure to testify in the case as to the real cause of the accident is not accounted for, ought to have controlled and restrained him so as to confine him to a safe speed, the jury were warranted in finding for the plaintiff as to his right to recover and in allowing full damages; and no direct point on the amount of the verdict being made here, either in the record, the argument of counsel, or their brief, and, so far as appears, none such having been presented and insisted upon in the court below, a new trial is not required merely because this court, on reading the record, has discovered that, in fixing the amount of the damages, the jury may not have deducted enough from the wages which the deceased was earning to cover his personal expenses, more especially as the evidence furnishes no basis for computing the amount of these expenses, and does not even show that the daily wages which the deceased was earning were not net, or in addition to board furnished by his employer, or by whom, whether by himself or his employer, board was furnished.

426. Rights of minor not the same as father's rights.

A suit against a railway company for personal injuries to a minor,

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brought in his behalf of his father, as next friend, is not, either as to cause of action or as to parties, actually or substantially the same as a suit by the father in his own right against such company for loss of the minor's services, occasioned by those injuries. The record of the former of two such suits is not, therefore, admissible in evidence on the trial of the latter on the theory that the causes of action were substantially the same. Nor is the testimony of a witness who was sworn on the trial of the former, and who afterwards died, admissible in evidence on the trial of the latter, under Code, § 5773 (5186). Hooper, 112/96.

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CHAPTER 22.

TORTS.

427. What are torts, Code, §§ 4403 (3807), 4405 (3809).
428. Negligent sale of cartridges; general discussion of the doctrine.
429. Proprietary medicine causes injury.
430. Runaway horse causes injury.
431. Judgment not assignable until it is rendered.
432. Torts are not assignable.
433. Abatement of actions for torts.

427. What are torts—Parties to actions.

A tort is a legal wrong committed upon the person or property independent of contract. It may be either: 1. A direct invasion of some legal right of the individual. 2. The infraction of some public duty by which special damage accrues to the individual. 3. The violation of some private obligation by which like damage accrues to the individual. In the former case, no special damage is necessary to entitle the party to recover. In the two latter cases, such damage is necessary. Code, § 4403 (3807).

When the law requires one to do an act for the benefit of another, or to forbear the doing of that which may injure another, though no action be given in express terms upon the accrual of damage, the party may recover. Code, § 4405 (3809).

Private duties may arise either from statute or flow from relations created by contract, express or implied. The violation of any such specific duty, accompanied with damage, gives a right of action. Code, § 4406 (3810).

Parties to actions for torts. An action for a tort must, in general, be brought in the name of the person whose legal right has been affected, and who was legally interested in the property at the time the injury thereto was committed, and against the party committing the injury, either by himself, his servant or agent in his employment. Code, § 5507 (4940).

In arriving at a correct understanding of the meaning of § 4403 (3807) the words "independent of contract" must be understood as applying to each one of the three subdivisions embraced in that section. Accordingly, the third subdivision means the same as if it read: "The violation of some private obligation, independent of contract, by which like damage accrues to the individual," and §

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4406 (3810) in so far as it refers to private duties flowing from "relations created by contract, express or implied," means the same thing. Lumpkin, P. J., Spinks, 104/692. Cited, 120/339; 119/373.

By the convict leases made by the prison commission under the act of December 21, 1897, and the amendment thereto approved August 17, 1903, the State did not deliver the physical custody of the convicts into the hands of the lessees; only the labor of the convicts was contracted for. The State itself had full control and management of the convicts, and appointed all the wardens, guards, etc., who had charge of the men employed in the work of the lessees. Subleases on similar terms were permitted, when approved by the prison commission. Lessees of convicts, under the acts mentioned above, were not, by virtue of their mere relation as such, liable to a convict for injuries inflicted upon him by the wrongful act of a guard or "boss," or by the negligence of a sublessee or of one of his employees. *Mason v. Hamby & Toomer*, 6 G. A. 131.

428. General discussion of the doctrine, sale of cartridges, bottles for beverage, defective building on a street.

In *Smith v. Clarke Hardware Co.*, 100/163, it was held that to a declaration substantially alleging that the plaintiff sought to purchase a particular kind of loaded cartridges, and was negligently given, by defendant's agent to sell, certain loaded cartridges, which were represented to be of the kind asked for, and which were alleged to be very similar in size, make and mark to those desired, but were in reality of different caliber, and that on account of such difference in caliber the plaintiff (he being without fault or negligence in handling the cartridges so purchased, and while using the same properly) was injured by the premature explosion of one of them, it was error to sustain a demurrer for want of a cause of action. That the allegations in the declaration authorized a submission of the case to a jury to determine the facts involved—among them, whether or not the injury could have been avoided by the plaintiff in the exercise of ordinary care. Little, J., said: "Has the plaintiff suffered at the hands of the defendant the consequences of a tort arising by reason of the negligence of the latter? Inasmuch as there can be no actionable negligence in the absence of the existence of a duty, and inasmuch as there can be no tort unless in a transaction of this character the law imposed upon the defendant the duty of exercising ordinary care in the sale of such goods to purchasers, it becomes

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only material to consider whether there was a duty imposed by law upon the defendant to exercise such care relatively to the plaintiff. As stated, there can be no case of the negligent injury of one person by another in the absence of a legal duty from the person inflicting the injury to the person on whom it is inflicted. 16 Am. & Eng. Enc. Law, p. 415, par. 8, and authorities there cited. It must be a duty implied by law, although it may arise out of contract. Bish. Noncont. Law, §§ 132, 133. In actions of tort no duty is considered in law except a legal duty, and all legal duties exist from implication of law. A contract merely creates this implication. Whart. Neg. § 24. In his treatise on negligence (section 24), Dr. Wharton has well defined a legal duty to be 'that which the law requires to be done or forborne to a determinate person or to the public at large, and is correlative to a right vested in such determinate person or in the public.' The obligation involved is not a moral obligation, but it is the obligation imposed on every member of society by law so to conduct himself and use his property as not to injure others. 'Sic utere tuo ut alienum non lædas.' 16 Am. & Eng. Enc. Law, p. 417. In every undertaking there arise by implication of law certain rights and duties. The duty incumbent upon the party engaged in the undertaking is to so conduct it that no injury will result to others; and upon every person holding himself out to the public as willing to act in a certain capacity, professional or otherwise, and who has induced persons to commit themselves or their property to his care, there is, by implication of law, a duty to use proper care in his conduct towards them, and, as a consequence of this duty, there is a liability to answer for injuries caused by a breach of it. Id. p. 420, and authorities there cited. Thus, an attorney is liable for negligently giving improper advice (*Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739); a physician, for negligence in the treatment of his patient (*Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417). It has been held that a caterer is liable for injuries caused by poisonous food negligently furnished by him at a public entertainment; the court holding that since he assumed to act as a caterer, and was employed as such, a duty was implied to him by law to perform with due care that which he had undertaken. *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154. So, also, an apothecary, who, by his servant, negligently sold, as and for tincture of rhubarb, two ounces of laudanum, was held liable for damages resulting from such negligent sale. *Norton v. Sewall*, 106 Mass. 143. In the case of

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Thomas v. Winchester, 6 N. Y. 397, it was held that a dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it, so labeled, into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label; the court further holding that the liability in such cases arises, not out of any contract or direct privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. The imminent danger attending the sale and use of such drugs, and the great difficulty of detecting their poisonous character, impose upon dealers the duty of exercising the highest degree of care known among practical men to prevent injury from the use thereof. 2 Shear. & R. Neg. § 691. While, in the sale of cartridges, ammunition, and other devices to be used in firearms, the degree of care required may not be so great, nor the scope of liability so far-reaching, as in the sale of poisonous drugs, by reason of the fact that the dangers attending the former are not so imminent as those attending the latter, there being in all probability much less difficulty in detecting the real kind and character of the one than would be true as to the other, yet it will not be contended that cartridges and kindred devices are not dangerous explosives; and, being such, they can not be blindly and indifferently distributed to purchasers, without regard to the purpose for which they are to be used, or the age and discretion of the person to whom they are sold. One holding himself out to the public as dealing in such articles at least owes to purchasers the duty of exercising ordinary care in the matter of placing into their hands the kind and character of goods for which they contract. This duty, of course, exists in a higher degree with respect to latent dangers which are hidden from the eye of the non-expert, and without the knowledge of the uninformed. In the present case we think the defendant owed to the plaintiff the duty of exercising ordinary care in the matter of selecting and selling to him the kind of cartridges asked for."

In **Sinkovitz v. Peters Land Company**, 5 G. A. 788, it was held that, it is the duty of the owner of a building which abuts upon a public highway to use ordinary care to keep it from being a source of danger to the public after its construction, as much as it is his duty originally to see that it is not a source of danger to the public by reason of improper or unskilful construction. While the owner

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of a building abutting upon a public street is not an insurer of the absolute safety of those who pass upon the sidewalk, reasonable care must be exercised by him to keep it in such condition as that neither the building nor any part thereof will fall and passers by be thereby injured. Where something unusual happens with respect to a defendant's property over which he has control, and by such extraordinary occurrence a plaintiff is injured (the occurrence being such as does not happen if reasonable care has been used), an inference may arise that the injury was due to the defendant's negligence. The maxim *res ipsa loquitur* is a rule of evidence, to be applied by the jury, if applied at all. The inference which may in some cases arise from an unexplained occurrence which has worked an injury to another, that the defendant who had in charge the instrumentality which was the direct cause of the injury was guilty of negligence, may or may not be drawn by the jury; but, like the fact of negligence or no negligence, the inference which the jury may be authorized to draw is peculiarly an inference of fact; and consequently, where the inference of negligence may as well be drawn as the inference that the casualty resulted from accident or the act of God, it is error to award a nonsuit. The maxim *res ipsa loquitur* is to be applied with the greatest caution, and its application depends greatly upon the circumstances of each particular case. But where the physical facts surrounding an occurrence are such as to create a reasonable probability that the occurrence—and the consequent injury—resulted from negligence, the physical facts themselves are evidential, and may or may not furnish evidence of the particular negligence alleged. If the extraordinary character of the occurrence is sufficient to raise an inference of the negligence alleged, a *prima facie* case is established, and the burden of disproving negligence, especially in a case where the parties do not sustain to each other the relation of master and servant, is cast upon the defendant, to disprove negligence upon his part; this for the reason that it is more particularly within his power to explain the character and condition of the instrumentality which may have occasioned injury than within the power of the injured party. In the absence of any satisfactory explanation that the occurrence was accidental or providential, or other sufficient explanation, if something unusual happens in respect to a defendant's property or to something over which he has control, whereby the plaintiff is injured, and the natural inference on the evidence is that the unusual

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occurrence is due to the defendant's act, the occurrence, being unusual, is said to speak for itself that such act was negligence. *Bahr v. Lombard*, 53 N. J. L. 233 (21 Atl. 190). A landlord is not liable for injury received by a person from falling on ice which had been allowed by the tenants to accumulate and remain on a sidewalk abutting the rented premises. This is true though the ice resulted from water which had flowed from the landlord's property through a ditch placed there for the purpose of carrying off the refuse water across the sidewalk; the ice not being on the sidewalk when the tenants entered into possession, although the ditch was on the property at that time and put there for the purpose above indicated. *Gardner v. Rhodes*, 114/929. Cited, 6 G. A. 52.

A manufacturer who makes and bottles for public consumption a beverage represented to be harmless and refreshing is under a legal duty not negligently to allow a foreign substance which is injurious to the human stomach, such as bits of broken glass, to be present in a bottle of the beverage when it is placed on sale; and one who, relying on this obligation, and without negligence on his own part, swallows several pieces of glass while drinking the beverage from a bottle, may recover from the manufacturer for injuries sustained in consequence. One who, under the circumstances stated in the preceding headnote, swallows several pieces of glass, which are subsequently removed from his stomach, leaving apparently no permanent injuries, may recover on account of mental suffering caused by the fear of death while the glass was in his stomach; but a vague fear, after the removal of the glass, and he has been restored to health, that at some time in the future he may again suffer as a result of his injuries can not be made an element of damage in a suit against the manufacturer of the beverage. *Watson v. Augusta Brewing Co.*, 124/121.

429. Proprietary medicine causes injury.

In *Blood Balm Company v. Cooper*, 83/457, the plaintiff alleged that he had been injured by a proprietary medicine, and it was held that where one prepares a proprietary or patent medicine and puts it upon the market and recommends it to the world as useful for the cure of certain diseases, the bottle containing it having therewith a prescription made by the proprietor of the medicine, in which he states that it is to be taken in certain quantities, and the medicine with this prescription is sold by the proprietor to a druggist for

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the purpose of being resold to persons who might wish to use it, and the druggist sells it to a person who uses it in the quantity there prescribed, and the same contains an ingredient, such as iodide of potash, in such quantity as proves harmful to the person thus using it, the proprietor is liable. The medicine having been put upon the market by the proprietor, not alone for the use of druggists, but to be used by the public in general who might need it for the cure of the diseases for which the proprietor set forth in the label that it was adapted, it was the same as if the proprietor himself had sold the medicine to the person who was injured by its use, with instructions and directions as to how the same should be taken. A medicine known to the public as dangerous and poisonous, if taken in large quantities, may be sold by the proprietor to druggists and others, and if any person, without more, should purchase and take the same so as to cause injury to himself, the proprietor would not be liable. Cited, 124/123. Dis., 119/621.

430. Runaway horse causes injury—A defective buggy.

Phillips v. DeWald, 79/732, was an action for a personal injury resulting from being run over by a horse, and it was held that though a horse be very sensible, very gentle, and accustomed to stand unhitched at his owner's door in a busy, noisy street, yet, if he be fancy, stylish, restless, and very high-strung, the jury may infer negligence from leaving him loose elsewhere in the same or another street, unattended, except by the owner watching him from a distance of five or six feet. When a horse attached to a buggy is, by the owner's negligence, loose in the street, and moving at will, persons who see the horse thus going at large are at no fault for trying to stop or capture him, and if by their rush, throwing up of hands, or other demonstrations, they frighten him, and cause him to run away, invade the sidewalks, and injure a person passing lawfully thereon, the owner will be responsible in damages for the injury. *Bleckley, C. J.*, said: "The diligence in securing his horse and preventing his escape, which the defendant was bound to observe, was that care which every prudent man exercises or would exercise in dealing with similar horses, at a like place, under like circumstances. The omission of that degree of diligence would be negligence, and whether it was omitted or not in this instance was a question for the jury. It is said that the horse was not vicious, or, if so, the defendant did not know it. A vicious animal is any indi-

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vidual of a vicious species, or a vicious individual of a harmless species. This horse was neither, and consequently the learning touching vicious animals, whether derived from statute or judicial decisions, has nothing to do with the case. Every horse whatever, no matter how gentle or amiable, must be properly attended or secured in the crowded business streets of a city, when there by the act of the owner, subject to his control. The instincts common to the species rendered this necessary, and of these instincts every owner must be presumed to have notice. The qualities of the individual horse have no relevancy, except as throwing light upon the means proper to be used to secure him, and the kind of attendance, or other precautions, which common prudence requires. Again, it is argued that, though the horse may have been loose in the streets by negligence, it was not that negligence, but the direct acts of others, which caused him to run away. Also, that the injury to the plaintiff was too contingent and remote, as related in defendant's negligence, to be the subject of recovery in damages. It may be fairly anticipated by one who negligently leaves a horse and buggy to straggle through a city that efforts will be made to stop or capture the horse, and that such efforts, or other movements or noises, may cause him to run away, and that, if he should run away, some person may be hurt. Between leaving a horse to go at random where there is great danger of doing mischief, and hurling a missive at or into a crowd—careless, if it strike or not—there is but little difference. The horse may be regarded as a squib—slow at first, but likely to become swift and destructive.”

The manufacturer of a buggy, who sells it to a municipal corporation for the use of one of its employees, representing it to be strong and in good condition, but knowing that it is in fact defective, the defect being so concealed by the use of paint and grease that the purchaser can not detect it, is liable in damages to the person whose use of the buggy was contemplated at the time of the sale, for injuries caused by such defect; and this is so notwithstanding there was no privity of contract between the plaintiff and the defendant in the sale of the buggy. *Woodward v. Miller*, 119/618. Dis., 124/123.

431. Judgment for a tort not assignable until rendered.

A judgment recovered in an action for a tort is not assignable before it comes into being, that is, before it has been rendered or

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entered up, although a verdict has been returned upon which judgment can be and is afterwards signed. The plaintiff acquires title, not by the verdict, but by the judgment, and until its rendition he has no title to assign; until then his action for the tort is not terminated, but is still pending and in progress. Until the final judgment the defendant is not subject to garnishment. A garnishment issued and served after a first verdict for the plaintiff, which verdict is subsequently set aside and a new trial granted, and answered before a second trial is had, the answer denying indebtedness, seizes nothing and takes no lien on the final recovery. *Gamble*, 80/595. Cited, 84/406; 87/389; 96/176.

432. Torts not assignable.

In *Central Railroad v. Brunswick & Western Railroad*, 87/386, the plaintiff alleged that its engine and its engineer, Scoville, had been damaged by a collision with defendant's train. The suit was to recover plaintiff's damages, and was for the use of Scoville as to the damage sustained by him in excess of what plaintiff had paid him. It was held that where a railroad company and its employee are both injured by the same negligence of another railroad company, the first company has no right, in an action for its own damages against the second, to sue also for the use of its employee to recover the damages sustained by him in excess of those already paid to him by the plaintiff in the action. *Simmons, C. J.*, said: "There can be no question that plaintiff had the right to sue for any injuries to its own property, or for the injury it may have sustained in the loss of its engineer's services, and expenses flowing directly therefrom, which may have been caused by defendant's negligence. But we are at a loss to perceive how the plaintiff can maintain an action for personal injuries received by Scoville for any amount exceeding what it had actually paid him on this account. For injuries received by him, and for which no compensation had been made to him by plaintiff, he, and he alone, in our opinion, would be entitled to sue the defendant. It is not alleged in the declaration that Scoville assigned to the plaintiff any right of action he may have had against the defendant, and certainly plaintiff is in no better position to bring suit for his use than it would have been to sue in its own right if such assignment had been made. If it be alleged in reply that plaintiff was seeking this particular recovery, not for its own benefit, but for the use and benefit of Scoville himself, the

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answer is that Scoville was competent to bring suit in his own name and right, and no reason appears why he should not do so. Even if he had attempted to assign his claims to plaintiff we do not think this could have been done. Our own Code, at least by implication, seems to settle the question that causes of action arising from torts are not assignable. Section 3652 (3076) classes such rights as choses in action, but the next section provides expressly that choses in action arising upon contract may be assigned, and is silent as to the assignment of choses in action arising upon tort. It would seem, therefore, under the rule, *expressio unius exclusio alterius*, that the latter are not assignable in this State. Such was the ruling of this court, and we think it sound, in *Gamble, supra*. The court, therefore, did not err in sustaining the demurrer to so much of the declaration as sought a recovery for the use of Scoville."

433. Abatement of actions for tort—practice in such actions.

In an action for personal injuries, the plaintiff recovered a verdict, the court granted a new trial and it was taken to the Supreme Court. Whilst pending in that court the plaintiff died, the judgment was affirmed, and, as the case had to be tried again, it was held that as the law then stood the action abated on its return to the court below. *Thompson, 60/120*.

An action against a railroad company for personal injuries, pending when the act of November 12, 1889, amending § 4421 (3825) of the Code, was passed, was not abated by the death of the plaintiff; nor is that act, as applicable to actions pending at the time of its passage, unconstitutional. *Pritchard, 87/294*.

Action for tort does not abate by the death of either party. No action for a tort shall abate by the death of either party where the wrong-doer received any benefit from the tort complained of; nor shall any action for the recovery of damages for homicide, injury to person or injury to property abate by the death of either party; but such cause of action, in case of the death of the plaintiff, shall, in the event there is no right of survivorship in any other person, survive to the personal representative of the deceased plaintiff and in case of the death of the defendant, shall survive against said defendant's personal representative. Code, § 4421 (3825).

The Court of Appeals is clothed with power to direct any order necessary for the proper adjudication of a cause. It may give any

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direction to a cause pending in the court below, which may be consistent with the law and justice of the case, including the power of directing a specific, final disposition of the case. But this power will not be exercised unless the discretion of the lower court has been improperly used or not exercised at all. It was not error to order a new trial. A verdict for damages against two or more defendants as tort-feasors should be set aside when it is, as against any one of the defendants thus held liable, unwarranted by the evidence. A plaintiff can sue one or more than one, or he can sue all, of several joint tort-feasors in the same action, and the jury, by its verdict, can bind one and relieve another, as the evidence may authorize, but if the verdict be rendered against all of the defendants, the judgment thereon is single, and must stand or fall alone. Such a judgment is in law a creature of such nature that it can not survive the severance or amputation of any one of its members. In an action brought against a defendant as a joint tort-feasor, a recovery may be had upon an allegation of negligence in which the other alleged tort-feasors did not participate. And where it is alleged that one of the defendants, by his servant, committed a tort, and that two other defendants directed, counseled, caused, or procured this servant to commit the tort in the conduct of his master's business, upon proof of these facts all or any one of them may be held liable. But if the connection essential to hold the two others is not established,—that is to say, if it is not shown that they directed, counseled, caused, or procured the servant to commit the tort, they may be discharged from liability, and the master alone be held liable for the wrongful conduct of his servant who committed the act. Finley, 5 G. A. 722. Cited, 6 G. A. 388; 7 G. A. 68. See Jordan, 23.

In an action against two or more joint tort-feasors, some may be held not liable and a recovery sustained as to the others. Henderson et al., 6 G. A. 385.

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CHAPTER 23.

PHYSICAL INJURIES.

434. Physical injuries, Code, §§ 4422, 4423 (3826, 3827).

435. Assault and battery.

434. Physical injuries.

A physical injury done to another gives a right of action, whatever may be the intention of the actor, unless he is justified under some rule of law. The intention should be considered in the assessment of damages. Code, § 4422 (3826).

What is a tort on person. Any violent injury, or attempt to commit a physical injury illegally upon a person, is a tort, for which damages may be recovered. Code, § 4423 (3827).

435. Assault and battery.

In *Tucker v. Walters*, 78/232, it was alleged that the defendant had cut the plaintiff with a knife. On the trial it appeared that a difference arose between the parties; plaintiff made a statement and defendant responded, "It is not so;" plaintiff said it was so, and upon the defendant repeating that it was not so, the plaintiff struck him, and then seized him from behind, catching his arms and crushing him down upon the floor, and while in this condition, the defendant took out a knife and stabbed the plaintiff in the leg. It was error for the court to charge that the words so spoken by the defendant, whether in a mild, kind or insulting manner, were not opprobrious words, and that the manner in which they were spoken would not make them so. It should be left to the jury to determine whether under all facts and circumstances of the case, the words were opprobrious and abusive or not, and whether or not the battery on the part of the plaintiff upon the defendant was justifiable. A new trial was not granted for this erroneous charge because the facts required a verdict for the defendant. Even if the words were opprobrious and justified the giving of the blow, the plaintiff followed up his battery with another without justification; and if it was necessary to the escape of the defendant for him to use his knife, he was justifiable in so doing.

In a civil action for assault and battery it is error to charge the jury as follows: "Under the laws of this State, opprobrious words do not justify an assault and battery, in a civil action by the person

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injured for damages as a result of such assault and battery." It is for the jury to say, in a given case brought to recover damages for an assault and battery, whether any opprobrious language that may have been used by plaintiff to the defendant is sufficient to justify the battery, or whether it shall merely mitigate it. *Beckworth v. Phillips*, 6 G. A. 859 (65 S. E. 1075); *Thompson v. Shelverton*, 131/714 (63 S. E. 220); *Garrett v. Herringdine*, 7 G. A. 744.

Where a defendant in a civil action for assault and battery attempts to justify or to mitigate on account of opprobrious language used to him by the plaintiff, the questions whether the language used was opprobrious, and whether it was such as to amount to justification or mitigation, are exclusively for the jury, and it is not incumbent upon the court, either with or without request, to charge the jury that particular words are opprobrious. *Thompson v. Shelverton*, 131/714 (63 S. E. 220; *Fish v. State*, 124/416 (52 S. E. 737); *Beckworth v. Phillips*, 6 G. A. 859.

In an action for assault and battery, especially where there is a prayer for punitive damages, the enlightened conscience of the jury affords the measure. It is not error for the court to refuse to allow the defendant to prove an act of justification or mitigation not pleaded. Especially is this true where the alleged conduct of the plaintiff was remote from the assault. *Beckworth v. Phillips*, 6 G. A. 859.

In an action to recover damages resulting from an assault and battery committed on the plaintiff, if there be aggravating circumstances either in the act or intention, punitive or exemplary damages may be recovered. *Berkner v. Dannenberg, et al.*, 116/954. This case again, 118/885. Cited, 126/61.

Where in a suit for damages on account of an assault and battery the court did not submit to the jury whether any exemplary damages should be found, but merely informed them that fines imposed by a mayor's court and city court on account of an alleged assault and battery should be considered in mitigation of exemplary damages, this contained an intimation of an opinion that the case was one for the allowance of such damages, and was error. *Holland v. Williams*, 126/617.

Verdicts and judgments are usually conclusive only upon parties and privies. The prosecutor is not such a party and has not such privity in a criminal prosecution as to make the verdict rendered

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in the criminal case binding on him in a civil case brought for the redressing of the same alleged wrong. *Powell v. Wiley*, 125/823 (54 S. E. 732), and cit.

In *Powell v. Wiley*, 125/823, it was held that, where an action was brought for damages for an alleged assault and battery, and the defendant offered a plea setting forth his acquittal in a criminal prosecution for the same alleged offense, there was no error in disallowing the plea or in refusing to admit evidence in support thereof. *Turnlin v. Parrott*, 82/735; *Cottingham v. Weeks*, 54/275. See also *O'Quin*, 124/357. The plaintiff brought an action for assault and battery alleged to have been committed on him by the defendant. The defendant, after filing a plea, offered an amendment to the effect that he had been acquitted in a criminal prosecution for the alleged assault and battery, and contended that this acquittal was a bar to the right to recover punitive damages. The court disallowed the amendment and refused to admit in evidence the record of the proceedings in the criminal prosecution; to both of which rulings the defendant excepted. The plea, after denying the assault charged in the petition, set up a counter-claim for damages arising out of a different assault which it is alleged the plaintiff, who was a street-car conductor, committed upon the defendant, when a passenger, under the following circumstances: The defendant boarded the car one night and requested the plaintiff to stop to let him off at Hampton street. This the plaintiff neglected to do, but instead carried him to the end of the run. On the return trip, the defendant declared his intention of remaining on the car without paying a second fare until Hampton street was reached. He was told by the plaintiff that he would have to pay another fare or get off the car; and on his refusal to do either, the plaintiff, it is alleged, struck him on the head with a club or some other heavy instrument, knocking him off the car, and leaving him lying senseless in the street, etc. Under this pleading, the court charged: "If the conductor carrying the defendant took him beyond his stopping place, he [defendant] would not have the right * * * to go to the end of the line and come back to his stopping-place, but his damage and his wrong would arise, if there was such, as soon as he was carried by his stopping-place, and his remedy would be to bring suit either against the company, the owner of the car in charge of the conductor, or against the conductor himself, for such damage as he may have sustained." The defendant assigns such charge as error, for

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the reason that "he had a right to stay on the car until it reached Hampton street on the return trip, the company having contracted to carry him to that place." Cited, 6 G. A. 859.

In *Morgan v. Langford*, 126/58, it was held that in an action for damages based upon an assault and battery, where the petition prays for punitive damages, alleging that the defendant's assault was without cause and aggravated both in the act and the intention, and this allegation is supported by proof, a charge wherein the court stated to the jury that the plaintiff claimed that he was humiliated and asked damages therefor is not erroneous on the ground that such damages were not authorized by the pleadings or the proof. Where in such an action the defendant pleaded a set-off on account of damages alleged to have been sustained by reason of a trespass committed by the plaintiff, and there was evidence introduced in support of the plea, to the effect that the plaintiff was in charge of certain railroad construction, in the course of which it was desired to remove certain branches and the top of a tree standing on the defendant's land near the dividing line between the railroad's land and the defendant's land, and that the defendant objected to the tree being so disfigured; whereupon the plaintiff gave instructions to have the limbs and top cut from the tree, stood by and saw the same being done, and refused to order the work stopped when so requested by the officer arresting him for the trespass,—a case was made out for the recovery of damages by the defendant, and it was erroneous for the court to instruct the jury not to consider the defendant's plea of set-off.

In *Pierce v. Hicks*, 34/259, the plaintiff sued for a battery. It was held that the keeper of a tippling-house has a right to defend himself against a dangerous assault made upon him therein by a person who has drunk there to intoxication, although such a house be not what is termed in law a man's castle.

Cross-actions in favor of each party against the other may arise out of the same affray; and such claims for damages may be presented in separate suits, or in a petition by one and a plea of set-off by the other. The party first assaulted may be entitled to damages against his assailant; but if the former use excessive force, or beyond what is necessary for his self-defense, he too will become liable to the other for the damages thus inflicted. Where one wrongfully makes an assault, but discontinues the beating, retires, declines further combat, or otherwise put himself in the right, he may sue

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and recover for damages then inflicted, notwithstanding he may have been the original aggressor. The charge that the defendant would be entitled to recover damages on his plea of set-off "if he was without fault" does not require a new trial, it being apparent from the context, and the charge as a whole that the court was applying the principle above stated, in instructing the jury that even though the defendant may have been originally wrong, he could recover if at the time of receiving the injury "he was without fault." The plaintiff was claiming punitive damages, and it was proper to read in charge the Code, § 4503 (3906) nor was this error against the defendant, as the judge also charged that both parties were claiming punitive damages. There is no assignment of error that the judge failed to instruct the jury upon the proper measure of damages in case the defendant was entitled to recover on his plea of set-off. *McNatt v. McRae*, 117/898.

In a suit to recover damages resulting from an assault and battery, the extent of the injury, and the existence and character of mitigating circumstances, are to be determined exclusively by the jury; and a verdict for nominal damages, approved by the trial judge, will not be disturbed by this court. *Ingram v. Savannah Electric Co.*, 4 G. A. 242. This verdict was for \$1.

Torts by wife, child, or servant.

CHAPTER 24.

TORTS BY WIFE, CHILD, OR SERVANT.

436. Torts by wife, child, or servant, Code, §§ 4413 (3817), 3603 (3031).

437. Relation of master and servant must first be established.

438. When the servant's act is within the scope of his duties.

436. Torts by wife, servant, etc.

Every person shall be liable for torts committed by his wife, and for torts committed by his child, or servant by his command, or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary. Code, § 4413 (3817).

Trespass of agent. The principal is not liable for the willful trespass of his agent, unless done by his command or assented to by him. Code, § 3603 (3031).

These sections must be construed so as to harmonize the two and allow both to remain of force, in the cases to which they apply. Turner, 72/292.

A master is liable for the wilful torts of his servant, committed in the course of the servant's employment, just as though the master had himself committed them. Woolfolk, 128/631.

437. Relation of master and servant must first be established.

The plaintiff sued for damages sustained from having been pushed off a car of defendant, while in motion, by a negro, who emerged from the car and stated that he was in charge of it. The mere declarations and acts of the negro, unless brought to the knowledge of the company or to their agents, who had charge of their train at the time, is not sufficient to make the company liable for his acts as their servant. The relation of master and servant must first be established by competent legal evidence in order to make the company responsible for his conduct. Lindsay, 46/447. Cited, 69/204.

A suit for damages for an injury alleged to have been sustained by the plaintiff while in the service of a railway company, where the undisputed evidence shows that the relation of master and servant between the plaintiff and the railway company did not exist at the time of the injury, any inaccuracy in abstract statements of law per-

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taining to the liability of a master to a servant is not ground for setting aside a verdict rendered in favor of the railway company. *Hangabook*, 130/264.

438. When the servant's act is within the scope of his employment.

In *Wood*, 94/124, a girl was struck by a stone thrown from a train of cars by an employee of the railroad company. It was held that the evidence being silent as to the specific duty of the servant of the railway company, but indicating that he was acting in the capacity of brakeman, and this servant, while the train was in motion, and he was upon it, having thrown a stone at a boy who had just attempted to swing to or climb upon the train, and who with others had previously been in the habit of committing or attempting similar trespasses; the stone being thrown after the boy had ceased attempting to trespass upon the train on the given occasion, and had retreated to private premises adjacent to the street, and while he was there endeavoring to conceal himself behind a post; and the stone by accident having missed the boy, and hit and injured another person, who was then on the same premises—no presumption arises that at the time of throwing the stone the servant was acting in behalf of the company, or within the scope of his employment, as to anything then done or attempted to be done with a view to injure or affect the boy; consequently, the company is not liable for the injury thus done to the third person. *Simmons, J.*, said: "The evidence is silent as to the specific duties of a brakeman, and does not show what authority this employee had from the railroad company to keep trespassers off the train; but, assuming that this came within the scope of his duties, no presumption arises that he was acting within the scope of his employment in throwing a stone at this boy, with a view to injuring him, after he had desisted from the trespass and gone off from the train. A master is not liable for the acts of his servant when such acts are not done within the scope of the employment in which the servant is engaged. If the brakeman, while these boys were engaged in the trespass, had, in attempting to prevent the trespass or cause them to desist, injured one of them through negligence or carelessness, or by using more force than was necessary for the purpose, the company would perhaps be liable. See *Wood*, *Mast. & Serv.* p. 537; *Rounds v. Railway Co.*, 64 N. Y. 129. But, after the boy had desisted, the company would not

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be responsible for an injury inflicted on him by the brakeman in attempting to punish him for the trespass. See *Golden v. Newland*, 52 Iowa, 59, 2 N. W. 609; *Allen v. Railway Co.*, L. R. 6, Q. B. 65. Cited, 98/753.

In *Thompson v. Wright*, 109/466, it was alleged that petitioner was engaged as a drayman in the transportation of freight from place to place in the city of Brunswick, for the purpose of which business he had a horse and dray, and in pursuit thereof frequented the wharves, docks and depots in said city for the purpose of soliciting business. While engaged in this business, the defendant was at the time the owner of the steamer *Hessie*, engaged as a common carrier in running a steamboat-line between the ports of Brunswick and Darien. Petitioner was at the landing-place of this steamer, and while there contracted with one Watkins for the transportation of certain hides from the dock of the steamer to Watkins' place of business in the city, the hides at the time being aboard the steamer *Hessie*. For the purpose of facilitating the loading and discharging of the steamer's cargoes, the officers and employees would lay its gang-plank from the deck of the steamer to and on the body of the wagons bringing or carrying away merchandise or other freights. On the occasion mentioned the mate of the steamer placed the gang-plank from the steamer's deck to the rear end of petitioner's dray, and kept the same in this position for the purpose of transferring the hides from aboard the steamer to the dray. When the loading was completed, petitioner went to his seat on the wagon and started to drive off, when suddenly, and without any warning to him, the mate of the steamer (being defendant's employee), having neglected to take in the gang-plank, wrongfully and negligently caught hold of one of the rear wheels of the dray, simultaneously uttered a tremendous yell, causing petitioner's horse to become frightened, from the effect of which the horse backed himself, hides, and dray overboard into the waters of the bay, carrying petitioner along with him. The mate was, when discharging the cargo of said steamer, in the regular discharge of his duties within the scope of his employer's business, and the duty devolved upon him to take in and otherwise attend to the keeping of said gang-plank, and petitioner was in no way connected therewith. A demurrer to the declaration was sustained. *Lewis, J.*, said: "The master is not liable for the acts of his servant which are not done within the scope of his employment. In this case the allegation of the petition is specific, that the negligent acts of the

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servant complained of were committed while he was in the regular discharge of his duties within the scope of his employer's business. A part of the business of the servant in this case was evidently to arrange to take care of and protect the gang-plank belonging to his master when the same was being used for the purpose of loading or unloading the vessel. It is clearly inferable from the discharges in the petition that, at the time of the negligent acts of the servant which resulted in plaintiff's injury, he was engaged in an effort to save the master's property. In *Wood, Mast. & Serv.*, § 300, it is declared: 'When a servant finds himself, or the subject-matter of his labor, in such a situation that in order to preserve his master's interests, he must do an act that will most likely result in injury to others, the master can not escape liability upon the ground that it was purposely done by the servant. If it was done in the course of the servant's employment, and in furtherance thereof, the law will regard the acts as having been impliedly authorized by the master.' Several instances are given by that authority which show the principle is equally as applicable to the facts in this case as it is to the cases cited in the text. In 14 *Am. & Eng. Enc. Law*, p. 810, the same principle is recognized in the following language: 'It is also well settled that a master is ordinarily liable for injuries caused by his servant in preventing damage or loss to property of the master.' In *Cooley, Torts* (2d ed.), § 538, it is declared: 'The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.' It was held that a petition alleging negligence on the part of an employee in and about a matter falling within the regular discharge of his duties within the scope of his employer's business, and consequent injury to the plaintiff, sets forth a cause of action against such employee's master."

A street-railway company is liable for a tort committed by its conductor in the prosecution and within the scope of its business, whether by negligence or wilfully. Where a petition alleged, that a conductor on the car of a street-railway company, while engaged in the prosecution and within the scope of his business in collecting fares, failed and refused to give a passenger correct change, and,

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upon request therefor, drew a pistol and fired at the passenger; but that the ball missed the passenger and struck a woman passing on the public street through which the car was running, causing her death; and that the plaintiffs were the husband and children of the decedent, the allegations set out a cause of action against the company, and the petition was not demurrable. Allegations that the company knowingly placed in charge of one of its passenger-cars a conductor of bad character, who was drunk and armed with a pistol, and that a homicide occurred in the manner indicated in the preceding note, were not demurrable. *Wheeler*, 128/550. Cited, 6 G. A. 471.

A principal or master being responsible for the negligent acts of his agent or servant only when done by command or within the scope of the employment, it is necessary, in an action seeking to charge one for the acts of another upon the theory that the latter was agent for the former, that the petition should disclose, either expressly or by necessary implication, not only the existence of the agency, but also the connection of the act with the employment. Where the owner or person in possession of an automobile merely permits another to use it, the latter does not thereby become the agent or servant of the former so as to charge the one with the other's negligence. The owner, or keeper, of an automobile will not be held liable for a negligent homicide committed therewith in a public street by a person old enough to be discreet and responsible in the eyes of the law, who took the machine, without the knowledge of the former, from a shop or garage where it had been left, although the person who thus took and drove the machine was inexperienced in its operation and unlicensed to run it, notwithstanding the leaving of the automobile at the shop or garage furnished the opportunity whereby such person got possession of it. *Lewis v. Amorous, et al.*, 3 G. A. 50.

Where a servant does an act in the execution of a lawful authority given him by his master and for the purpose of performing what the master has directed, the master will be liable for an injury thereby inflicted on another, whether the wrong be occasioned by negligence or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner. In the present case there was evidence from which the jury could find that the wrong done by the servant was done within the range of his employment and for the purpose of accomplishing the business which the master had authorized him to do. *James*, 118/341.

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In *Blackmon*, 3 G. A. 80, it was held that a surgeon, being sent by two railway companies to a wreck, to give professional attention to an engineer who had been injured, caused him to be moved to a hospital, where he soon died; after the death had occurred he ordered the body carried to an undertaker's establishment, and there he and the undertaker, without the consent of relatives, mutilated the corpse. Held, that the tort of the surgeon was not within the scope of the business for which he was employed, and that the railway companies were not responsible for the mutilation. Powell, J., said: "Whether the railway company furnished surgical attention to the engineer for the purpose of diminishing the effect of an injury for which they apprehended they might be held liable, or as a mere gratuity, the business entrusted to the surgeon was that of ministering to a living man; and when death had rendered all further ministration unavailing, the duty and business with which he had been entrusted by the railway companies were at an end. Certainly the limit to the scope of his authority was reached when he had closed the dead eyelids down and had delivered the body to him to whom next in natural order the corpse should go,—the undertaker. A case might arise in which a railroad company would be liable for the mutilation of a dead body by a surgeon; as, when, for the purpose of obtaining evidence or for other reason, it directed an autopsy to be made. Such is not here alleged to be the case. The mere allegation that the person committing the tort was agent and surgeon at the time does not render any the less necessary the statement of facts showing that the act was by command of the employer or within the scope of the employment. *Lewis v. Amorous*, ante, 50 (59 S. E. 338)."

In *Hodges*, 6 G. A. 470, it was held that if a servant steps aside from his master's business, for however short a time, to do an act entirely disconnected from it, and injury results to another from such independent voluntary act, the servant may be liable, but the master is not liable. Russell, J., said: "Hodges sued the Savannah Electric Company for damages arising from personal injuries. It appears that he was a conductor upon the Montgomery and Best street line of the defendant company. At the time of the injury his car was standing at the terminus of the line and within ten feet of a repair or 'wire' car, which was waiting to follow the passenger-car into the city. He got off of his car to change the trolley, in order to make ready for the return journey. He thus came be-

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tween the two cars. Baker, a servant of the defendant on the repair or 'wire' car, struck at him, and in doing so knocked the controller and thus started the car, which struck him and inflicted the injuries for which he sued. There is conflict in the evidence as to whether the plaintiff joined in 'skylarking,' 'joshing,' or other play with Baker or other employees of the defendant. There is no conflict, however, as to the fact that Baker started the car, not intentionally but by striking at the plaintiff in a playful manner. We deem it immaterial, therefore, whether the plaintiff participated in the play and knew that Baker was going to strike at him, or not, because the real question in the case is whether the defendant company is liable for the stroke of Baker which was the cause of the starting of the car and the resulting injury to the plaintiff. The controlling question, presented both by the motion to nonsuit and by the motion for a new trial, is whether a servant can recover from his master for an injury which the undisputed evidence shows was caused by an act of a fellow servant not within the scope of his duties, and yet while in the employment of the master and while waiting to recommence the active duties of his employment. Nothing is better settled than that the master is liable for injuries resulting from his servant's negligent performance of his duties, or from a negligent omission to perform his duties, provided that the act causing the injury or the omission to act is within the scope of the servant's employment. * * * What, then, is the test by which it should be determined whether the act of the servant was within the scope of his employment? Judge Thompson, in his Commentaries on the Law of Negligence, volume 1, § 526, says: 'The test by which to determine whether the master is liable for the tortious act of his servant is not whether it was done during the existence of the employment, that is to say, during the time covered by the employment, but whether it was done in the prosecution of the master's business. Upon this subject it has been said "In determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself and his own master *pro tempore*, the master is not liable. If the servant steps aside from his master's business, for however short a

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time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities.”’ This doctrine is not in conflict with any of the rulings made by the Supreme Court in the cases relied on by counsel for the defendant in error. In any case where there appears to be a conflict, it will be seen on examination that the apparent conflict is due to the fact that negligence was imputed to the master in the selection of incompetent or vicious servants, but no such negligence is alleged or relied on in the present case. * * * If Baker had started the car, which it was his duty to guard while the plaintiff was between the two cars, negligently or intentionally, in furtherance of the master’s business or in line of his duty, the defendant would be liable. But it is clear from the evidence that the controller was not turned negligently or intentionally, but was struck accidentally. The undisputed evidence, therefore, shows that the underlying cause of the casualty was accidental. It was by accident that the controller was turned, and the accident occurred while Baker was not engaged in the duty with which he had been charged by his master, but during a period, however short, in which he had stepped aside and was engaged in a prank with one of his co-employees.”

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CHAPTER 25.

EMPLOYER'S LIABILITY FOR THE ACTS OF AN INDEPENDENT CONTRACTOR.

439. When employer is liable for the acts of an independent contractor.
Code, § 4415 (3819).
440. This section is exhaustive of the subject.
441. Independent employment.
442. Employer is liable when the obligation is statutory.

439. Employer, when liable for acts of contractor.

The employer is liable for the negligence of the contractor (1) when the work is wrongful in itself, or, if done in the ordinary manner, would result in a nuisance; (2) or, if according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed; (3) or, if the wrongful act is the violation of a duty imposed by express contract upon the employer; (4) or, if the wrongful act is the violation of a duty imposed by statute; (5) or, if the employer retains the right to direct or control the time and manner of executing the work; or interferes and assumes control, so as to create the relation of master and servant, or so that an injury results which is traceable to his interference; (6) or, if the employer ratifies the unauthorized wrong of the independent contractor. Code, § 4415 (3819).

One who employs an independent contractor to do work upon his premises, and who places his property in the charge of the independent contractor, for the purposes of the work, is not, generally, liable for injuries resulting to the contractor's servants engaged in the work, or to others. Especially is this true where the employment of the independent contractor is for the purpose of making repairs, and where, for this reason, the work is necessarily and obviously dangerous. Even where an independent contractor is employed to make repairs, the employer may become liable for injuries sustained by a servant of the independent contractor, either on account of his own wrongful act or by interfering and assuming control, so that an injury results which is traceable to his interference. Johnson, 4 G. A. 131. Cited, 6 G. A. 150; 7 G. A. 68.

The owner of a building which has been damaged by fire, who delivers the same to an independent contractor for the purpose of

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repairing it generally and putting it in thorough order, and who surrenders to the latter full possession and complete control of the premises, is not, merely because of the peculiar arrangement of some of the interior appointments of the building,—such as an elevator-shaft, stairways, etc., which, under certain conditions, may become sources of hidden danger to one unfamiliar with their location,—liable to any person going into the building by invitation of the contractor, for damages resulting from physical injuries sustained because of exposure to such danger. In such a case the contractor is in law chargeable with knowledge of the existence of such appointments and their peculiar location, and therefore, relatively to the servant of one whom he employs to do a portion of the repairing, under the duty of taking proper steps to guard him against any injury likely to occur by reason of the existence of such danger. *Butter v. Lewman & Co., et al.*, 115/752.

One who employs an independent contractor to do a specific piece of work, not in itself unlawful, is not liable for an injury caused by a casual act of negligence of the contractor while the work is in progress. The fact that the owner of a building to be constructed furnishes to the contractor the material for the building, or stipulates in the contract that the work of constructing shall be performed by the contractor according to plans and specifications of an architect and to the satisfaction of the engineer of the owner, does not make the owner liable for an injury resulting proximately and solely from a negligent act of the contractor in the work of construction. *Lampton v. Cedartown Company*, 6 G. A. 147.

In *West v. Braxelov Steamship Co.*, 124/658, Fish, C. J., said: "From the evidence it appears that the plaintiff was not a servant of the defendant company, but was employed by the stevedore who was engaged in loading the ship, and who, apparently, was an independent contractor for this purpose. If the stevedore had taken a contract to load the vessel with the lumber and furnished the labor and necessary appliances for so doing, then it is clear that the owner of the vessel would not be liable to the plaintiff for the consequences of the negligence of such independent contractor. *Young v. Smith & Kelly Co., infra.*

An independent contractor is not liable for injuries to a third person, occurring after the contractor has completed the work and turned it over to the owner or employer and the same has been accepted by him, though the injury result from the contractor's fail-

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ure to properly carry out his contract. *Young v. Smith & Kelly Co.*, 124/475.

In *Richards v. O'Brien Brothers et al.*, 1 G. A. 107, Hill, C. J., said: "It is unquestionably a sound principle of law that after the contractor has completed the work and turned it over to the owner, and it has been accepted by the owner in discharge of the contract, the contractor incurs no further liability by reason of the negligent manner in which the work has been done, but the responsibility, if any, for maintaining or using it in its defective condition is shifted to the owner. The contractor remains liable, if at all, only to the proprietor or owner, for a breach of his contract. 1 *Thomp. Neg.*, §§ 686, 687; *Easton v. Smith*, 26 L. R. A. 504. Before this responsibility is shifted from the contractor to the proprietor or owner, it must be shown that the work was fully completed by the contractor, fully accepted by the owner or proprietor, and the contractor fully discharged of the contract."

The city of Atlanta employed the Withers Foundry & Machine Works to repair an engine used in the operation of its system of water-works. Huey, an agent of the contractor, was killed in making the repairs, and his children sued the city. It was held that where the proprietor or possessor of land, houses, structures, or other like things, employs an independent contractor to do work thereon, but does not surrender the custody of the premises or of the structure or other thing, as the case may be, to the independent contractor, and a servant of the independent contractor, coming and attempting to do the designated work in a manner reasonably to be anticipated, is injured by some latent danger in the conditions surrounding the premises, structure, or other thing, of which the proprietor has actual or constructive knowledge, and of which the workman has no knowledge, actual or constructive, the failure of the proprietor of the premises to warn him of the danger or to inform him of the conditions is a wrong, and such a breach of duty as will give rise to a cause of action in favor of the injured workman against the proprietor for the injury inflicted. If the proprietor of premises on which machinery is located employs an independent contractor to repair a particular machine, and the proprietor knows, or by the exercise of ordinary care should know, not only that the machine is out of repair, but that there is some extraordinary latent danger or perilous condition attaching upon the service, and the independent contractor sends a servant to make

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the repairs (the servant being actually or constructively ignorant of the extraordinary danger), it is the duty of the proprietor of the premises to warn the servant thereof; and for a breach of this duty, resulting in injury to the servant, the latter has a cause of action against the proprietor of the premises. Powell, J., said: "Counsel for the city cite the section of the Code, § 4414 (3818) and a long line of decisions which declare that the proprietor of the premises generally is not responsible for torts committed by a contractor doing work for him, where the contractor exercises an independent business which is not subject to the direction and control of the proprietor, and contend that since the Withers Foundry and Machine Works was an independent contractor, and Huey was an employee of the contractor, the city is not liable in this transaction. This case, if we understand it, does not fall within the doctrine announced in the section of the code just referred to and the cases cited. That code section and those decisions relate to cases where there has been a breach of duty toward the servant by the independent contractor as master,—in other words, where the action is predicated of some negligence of the independent contractor. They are not applicable to cases such as this, involving the distinct and independent negligence of the owner or proprietor of the premises. In sum and substance, the code sections and the decisions referred to declare that an independent contractor is not usually such an agent of the person employing him as to make the latter responsible for the torts of the former; it is their object to declare a limitation upon the application of the doctrine of respondeat superior, and not to exempt any one from responsibility for his own personal negligence. They leave the rule of liability in cases where the proprietor and an independent contractor both figure in the transaction such as that each party is responsible for his own neglects and wrongs, and not for those of the other. The question in each case is, whose negligence is involved; who has violated the particular duty? In those cases where the cause of action is predicated of a breach of one of those duties imposed upon the master by reason of the contract of employment, the independent contractor, being the master, is the one to whom the injured person must look for damages; and, unless the case falls within one of the exceptions stated in the code section, the person employing the independent contractor is not responsible for injuries resulting to the latter's servant. Then there is a class of cases (and

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we consider this case as being within that class) where the proprietor of the premises is, by reason of wrongs for which he is the author, guilty of negligence,—wrongful in some cases as against both the independent contractor and such employees as he may send to do the work. The great leading case in which this doctrine is expounded, and which has so often been cited approvingly by courts both English and American, is *Indermaur v. Dames*, L. R. 1 C. P. 274 (35 L. J. C. P. 184, 2 C. P. 311, 36 L. J. C. P. 181)." Huey, 8 G. A. 597.

440. This section is exhaustive of the subject.

In *Ridgeway v. Downing Company*, 109/591, it was held that where the owner of a vacant city lot, who for many years has suffered the public to use a thoroughfare over the same, employs an independent contractor to construct a building thereon according to certain specifications, including excavations for piling for the foundation, and the contractor digs a trench for such purpose across the thoroughfare, the owner is not liable for a personal injury sustained by one who falls into the trench by reason of its unguarded condition. Fish, J., said: "As § 4415 (3819) of the Code undertakes to declare when the employer shall be liable for the negligence of the contractor, and specifically enumerates the instances in which he shall be, we think it is exhaustive of the subject—that the only instances in which an employer of an independent contractor is liable for the negligence of such contractor are those therein enumerated and defined." Cited, 115/756; 124/477; 6 G. A. 150.

441. Independent employment.

A railroad company is not liable for injuries sustained by laborers in the employ of a contractor who was working for the company, though it may have furnished implements and materials for the performance of the work. The plaintiff was engaged in filing an embankment on defendant's road with a dirt-car that fell from a trestle. The trestle gave way. The work was let out by defendant to Adams. His overseer paid the plaintiff, and defendant had nothing to do with hiring him, nor did it have control over the mules, cars, or men, although, in the contract with Adams, it agreed to furnish track, trestle and motive power. *Grant*, 46/417. Cited, 62/691.

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In *McConnell*, 87/756, it appeared that the Fulton County Street-Railroad Company obtained a charter authorizing it to build a street-railroad through certain streets of the city of Atlanta when it should obtain the consent of the municipal authorities. It seems this consent was obtained by the company, and it made a contract with the Thomson-Houston Electric Company another corporation, whereby the latter undertook to furnish all the material and the entire construction of the road, without any direction or control reserved to the street-railroad company. During the progress of the work upon West Peachtree street, the contractor laid the iron rails about eight feet apart on each side of the proposed road-bed, a considerable distance beyond and ahead of the place where its hands were taking up a pavement and preparing the road-bed for the cross-ties and iron. The rails thus laid furnished a continuous line on each side of where the road-bed was to be placed, for a considerable distance ahead of the hands. *McConnell* was riding on horseback upon that street, and in attempting to cross the street where these iron rails were laid, the horse struck his foot against one of the rails, and fell, seriously injuring *McConnell*. He brought his action for damages against the street-railroad company and the Thomson-Houston Electric Company jointly and recovered against both. It was held that where a street-railway company, having authority under its charter to construct a railway in the public street, does the work by an independent contractor, and an injury to a person passing along the street is caused by the negligence of a servant of the contractor, which negligence consisted in unnecessarily and improperly laying down loose iron rails in advance of the workmen engaged in constructing the track, the contractor is liable for the consequences of such negligence, but the railway company is not, the latter company not having reserved any control over the conduct of the former in executing the work. *Simmons, J.*, said as to the electric company: "The testimony shows that there were two ways to mark the lines to guide the hands—one safe and the other unsafe. Where a person or corporation is authorized by law to obstruct the public streets of a city for any purpose, it is incumbent on him or it to exercise great care to prevent passengers along the streets from being injured; and if in the progress of the work it becomes necessary to do a certain thing, and there are two ways of doing it, one safe and the other unsafe and unnecessary, if the unsafe method is adopted, and a person is

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injured thereby, it is such negligence on the part of the person or corporation performing the work as would authorize the party injured to recover damages. Although a person may have authority to obstruct the street for the purpose of constructing a railroad-track therein, he has no right to obstruct more of that street than is necessary for the proper performance of his work at that time and place. He has no right to put obstructions far in advance of the work which is being performed, and which are unnecessary at that time to enable him to carry on his work. The people have a right to the use of the streets as well as the street-railroad companies or their contractors, and neither the companies nor their contractors have a right to prevent the free use of and access to the streets by the people, except at times and places where it is necessary for the companies or contractors to occupy them; and if they should place unnecessary obstructions in the street, and a passenger in the street should be injured thereby, they would be liable, unless the injury could have been avoided by the exercise of due care on the part of the passenger. We therefore think the court did not err in overruling the motion for a new trial as to the Thomson-Houston Electric Company." As to the railroad company, he said: "The electric company was to furnish all the material, and was not to be subject to the direction or control of the railroad company. This made it an independent contractor, and not the servant or agent of the railroad company, and the testimony does not bring the railroad company within any of the exceptions to the general rule laid down in § 4414 (3818)." Cited, 106/275; 109/595; 124/477.

442. Employer is liable when the obligation is statutory.

In *Wilson & Bro. v. White*, 71/506, the owner of a city lot contracted with Wilson & Brother to furnish material and lay a pavement on the street adjoining the lot. Wilson & Brother hauled the brick for laying the pavement, and piled them up in the gutter beside the place where the work was to be done. They engaged the services of Backus to provide the sand and lay the brick, agreeing to pay him a stipulated price per yard for the work. Having no lamps of their own, they requested Backus to provide signal-lights and place them upon the brick, while the improvement was going on and while the street was obstructed. Mrs. White, in going along the sidewalk at night, and for the want of a light, came in

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contact with the brick and was injured. She sued Wilson & Brother. Among other defenses they set up that Backus was the contractor in charge of the work, and he was liable and they were not. Two replies were made to this defense: First, that Backus was not a contractor, but merely the servant of Wilson & Brother, who were in fact the contractors and the responsible parties. Second, that whether Backus was a contractor or not was immaterial, as Wilson & Brother were the owners of the material which caused the injury, and were required by the city ordinances to put lights on the material at dark—and that they could not escape responsibility by agreeing with another to discharge this duty to the public which had in express terms been enjoined upon them by law. A verdict was rendered for the plaintiff. A new trial was moved for. It was denied, and it was held that if an independent contractor is employed to do a lawful act, and in the course of this work he or his servants commit some casual act of wrong or negligence, the employer is not responsible; but unless the employee (who was himself a contractor) had relinquished his control over the work to the subcontractor, and had nothing further to do with it, either in furnishing material or otherwise, except to see that it was done to the satisfaction of the person for whom it was done, then the subcontractor was not an independent contractor, but was the servant and agent of the original contractor, his act was the act of the original contractor, and the responsibility was upon the latter to answer for any damage done to another in consequence of his failure to perform his duty. And where the ordinance of a municipal corporation required the owner of any materials which formed an obstruction in its streets or sidewalks to prepare and place lights thereon before dark with such care and diligence as reasonably to secure their burning until daylight, such owner is liable for any injury that arises to others in consequence of the negligent performance of this duty, whether it was performed by himself or by a contractor employed by him. The foregoing case was decided upon the principle that the person upon whom a statutory obligation is imposed is liable for any injury that arises to others from its non-performance or in consequence of its having been negligently performed, either by himself or by a contractor employed by him. *Kimberly*, 87/167. Cited, 87/759; 124/477; 2 G. A. 372; 4 G. A. 135; 6 G. A. 150.

Malpractice of surgery and medicine.

CHAPTER 26.

MALPRACTICE OF SURGERY AND MEDICINE.

443. Malpractice of surgery and medicine.

443. Malpractice of surgery and medicine.

A person professing to practice surgery, or the administering of medicine for a compensation, must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill will be a tort for which a recovery may be had. Code, § 4427 (3831).

In *Smith v. Overby*, 30/241, the trial judge charged the jury that every physician undertakes to bring to the exercise of his profession a reasonable degree of care and skill; he does not undertake to use the highest possible degree of skill, but he undertakes that he will bring a fair, reasonable and competent degree of skill. The care required of him should have reference to the nature of the business he is called on to perform. He is not responsible for an error in judgment, if such error arises from the peculiar circumstances of the case, and not from want of proper care or skill on his part. This charge was approved by the Supreme Court.

In *Moon v. McRae*, 111/206, the plaintiff alleged malpractice which resulted in the loss of a limb. The case was reversed because of an error in the charge of the court as to pain and suffering.

In *Bell v. Wooten*, 53/684, the plaintiff sought to recover damages for alleged unskillfulness in amputating his son's leg. He did not allege that his son was a minor and that he was entitled to his services as a minor. It was held that a demurrer should have been sustained to the declaration.

In *Ingram*, 114/639, it was held that in a suit for damages alleged to have been caused by the malpractice of a surgeon, the burden is on the plaintiff to show a want of due care, skill, or diligence, and also that the injury resulted from the want of such care, skill, or diligence.

In a suit against the "Plant System Relief and Hospital Department," which was averred to be a voluntary association composed of certain named railroad corporation, "and having an office, agent, and place of business" in the county in which suit was brought, this court can not, on a general demurrer filed by said Plant System Relief and Hospital Department, hold that beneficiaries of such association are necessary parties. The plaintiff below, the defendant in

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error, having sued for damages alleged to have resulted to him from the "gross and inexcusable negligence and want of skill and care" of the physicians and surgeons in charge of the hospitals of the plaintiff in error, in their attention to him, and not having averred that the plaintiff in error did not observe due care in the selection of said physicians and surgeons, the general demurrer should have been sustained. *Plant System Relief & Hospital Department v. Dickinson*, 118/647.

Liability of landlords.

CHAPTER 27.

LIABILITY OF LANDLORDS.

444. When landlord is liable for defects in rented premises, Code, § 3694 (3118).

445. Duty of landlord as to examining and repairing the premises.

446. Actions by tenants against landlords.

444. When landlord is liable for injuries caused by defects in rented premises.

The landlord, having fully parted with possession and right of possession, is not responsible to third persons for damages resulting from the negligent or illegal use of the premises by the tenant. But he is responsible to others for damages arising from defective construction, or for damages from failure to keep the premises in repair. Code, § 3694 (3118).

445. Duty of landlord as to examining and repairing the premises.

A landlord is not liable for personal injuries to a servant of his tenant arising from a defect in the rented premises, of which the landlord had no knowledge, and which he had not been notified to repair. When the tenant is in the exclusive possession and control of the rented premises, the landlord is under no duty of examining the same with a view to ascertaining whether or not repairs are needed, unless requested so to do. Lumpkin, P. J., said: "While, under § 3694 (3118) of the Code, a landlord is responsible to a servant of his tenant 'for damages arising from defective construction, or for damages from failure to keep the premises in repair,' he is not liable because of a failure to repair a defect of which he neither knew, nor ought, in the exercise of reasonable diligence, to have known. Properly construed, this section does not make a landlord responsible as an insurer, but liable only in the event he fails to comply with his statutory duty of keeping the premises in repair." *Ocean Steamship Co. v. Hamilton*, 112/901. Cited, 123/658.

The owner of property is liable for injuries caused by defective repairs made by the tenant in possession, where the law imposes upon the owner the duty of making such repairs, or where the ten-

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ant is authorized by the owner to make the repairs. *Byne v. Mayor & Council of Americus*, 6 G. A. 48.

In the absence of a contract assuming liability therefor, tenants ordinarily are not liable for repairs. *Johnson*, 4 G. A. 131.

A landlord is liable to one lawfully present on the rented premises, by invitation of the tenant, for injuries arising from defective construction, or from failure to keep the premises in repair, where the defect is known to the landlord or in the exercise of reasonable diligence could have been known, and the injured person was himself in the exercise of due care. *Ross v. Jackson*, 123/657.

In *Monahan v. National Realty Company*, 4 G. A. 680, it was held that, a landlord is liable for defects in the original construction of a building, whether he knows of them or not. And where he retains a qualified possession and general supervision of his building, he may also be held liable for injuries arising from failure to maintain the building in proper repair, either if he knew of the defects or if, in the exercise of ordinary care, he should have known of them. In an action brought to recover for injuries due to the defective construction of a building, evidence as to the condition of the building at the time of the casualty may be admissible for the purpose of illustrating that the construction of the building was originally defective, and to show that the immunity which a landlord may ordinarily claim, upon the ground that he exercised due care in obtaining the advice of experts, has been withdrawn by reason of the facts that he had had ample notice (from actual physical conditions, brought to his attention or to that of his agents) that the construction was improper in the first instance. The maxim *res ipsa loquitur* is simply a rule of evidence; and whether, under a given state of facts, the maxim is to be applied is an inference to be reached by the jury, and not by the court. In a case where one, himself in the exercise of due care, sustains an injury which is primarily traceable to the operation of some portion of a building, and the casualty is of a kind which does not ordinarily occur where a building has been properly constructed, a jury may be authorized to infer that the resultant injury was due to original defective construction. The duty of proper construction, devolving upon a landlord, is an absolute duty; he is especially charged with knowledge of the character of a building constructed by him; and where injury caused by an appliance of the building results to one properly invited by a tenant into the building, negligence is *prima facie* at-

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tributable to the landlord. Where the only objection made to the introduction of evidence is that it is irrelevant to illustrate a certain issue, it is not error to overrule this objection, if the evidence is relevant to any other issue in the case and if no objection is made to the competency of such evidence. Although testimony may be incompetent, it need not be excluded upon that ground, unless that objection be specially raised. From knowledge of the existence of a present condition, knowledge of the existence of the same condition in the past may sometimes be implied. One may be liable for the result of a hidden defect, as well as for injurious consequences of a patent defect, unless he did not know or, in the exercise of due care, ought not to have known of such latent defect. A landlord is liable for a defect of construction, latent or otherwise, the existence of which he knew or ought to have known. Construction which is not strong enough to stand the strain of ordinary use is defective construction. In this case the petition alleges, that Mrs. Monahan went to the office of a dentist in the defendant's building to be treated; that while there, the annual policemen's parade passed by, and that she raised one of the windows to look at the parade, and, when she raised the window, the chains which supported the sash broke and fell upon her hand, injuring it; that she did not know and could not, by ordinary care, have known of the size and weakness of the chains; that the defendant could, by the exercise of ordinary care, have known of the weakness of the chains, and did, in fact, know of it, and further knew that the occupants and visitors to the office in the defendant's building went to the windows for the purpose of looking out, and especially when public parades were passing. Cited, 5 G. A. 322, 791.

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This being an action by a tenant against a landlord for personal injuries alleged to have been occasioned by the defendant's failure to keep in proper and safe repair a certain veranda-railing, and the question of the plaintiff's right to recover being dependent upon whether or not he was guilty of negligence in putting the railing to an improper use by sitting upon it, and the evidence for the plaintiff affirmatively showing that he was in this respect negligent, and might by the exercise of ordinary care have avoided the injuries, there was no error in granting a nonsuit. *Balch v. Garling*, 102/586. Cited, 118/795.

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In *Johnson v. Collins*, 98/271, a tenant sued for injuries caused by defective steps. She alleged that she knew the steps were out of repair and had made several attempts to have them repaired by the landlord. He did nail the steps to the door-sill, but it was insufficient to hold them, and only kept them in position for a short while. She and her son had worked on them, and she supposed that the props which they had used to support them would be sufficient. She had no reason to believe them dangerous. A demurrer to the declaration was sustained. Atkinson, J., said: "If the steps were out of repair, but, not so obviously so as that a person of ordinary prudence must have known they were dangerous, then she was entitled to go to the jury upon the question as to whether there was an apparent danger in their use. As long as she did not know they were dangerous, or had no reasonable ground to suspect such to be the fact, her use of them could not be legally considered negligent." Cited, 104/809; 111/150.

In *Alexander v. Rhodes*, 104/807, it was held that a tenant has no right of action against a landlord for personal injuries sustained while attempting to pass from the house rented, when the landlord had the steps leading therefrom removed for the purpose of making necessary repairs, this condition of the premises being well known to the tenant before and at the time of the injury. This is true notwithstanding an emergency to leave at the particular time and place when egress from the house was sought, which could not have been foreseen by the landlord in time to prepare temporary facilities for a safe exit from the house. Simmons, C. J., said: "The landlord was complying with his duties under the law. He was making needed repairs, which had, doubtless, been demanded by the tenant. There was no negligence on the part of the landlord in removing the steps in order to make the repairs. There was no notice given him, before the steps were removed or afterwards, of the emergency which necessitated the tenant's leaving the house. Without calling on the landlord or his agent to replace the steps, or to provide means of egress from the house, in order to respond to the emergency, the tenant undertook to descend 'by sliding or easing down herself to the ground.' In so doing, she assumed the risk or hazard. She slipped and fell, and was injured in this attempt to lower herself to the ground, and this fall was clearly occasioned by her own negligence, or was attributable to the accident alone. The facts of this case differ from those of *Johnson v. Collins*, *supra*. In that

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case the landlord had made repairs, but had done so in a manner so negligent that the tenant, in attempting to use the steps, was injured. In this case the landlord was in the act of making repairs; the tenant saw the danger, and assumed the risk; and we can not see that the landlord was in any manner negligent, or upon what principle he could be held liable."

In *Stack v. Harris*, 111/149, it was held that though a landlord will not be liable in damages for injuries to a tenant resulting from the defective condition of a plank in the floor of the rented building, of which the landlord had no notice, a petition which alleges that the plaintiff (a tenant) was injured by reason of such a defect, and that the landlord (the defendant) had notice of the "defective condition of the floor," sufficiently alleges, as against a general demurrer, that the defendant had notice of the defective condition of the plank. Cobb, J., said: "Although the rule at common law was to the contrary, under our Code, the landlord, in the absence of a stipulation to the contrary, is bound to keep the premises in repair. He is, however, entitled to notice from the tenant that the premises are out of repair, and if, after such notice has been given, the tenant suffers damage on account of the failure of the landlord to make the necessary repairs, the landlord is liable for the damage thus sustained, provided the conduct of the tenant was not such as to preclude him from recovering. Under the law of this State, it is presumed that the premises leased are in a condition suitable for the purposes for which they were rented; and if such is not the case, and damage results therefrom to the tenant, the landlord is liable, provided he has had notice of the defective condition of the premises, and has failed after a reasonable time to make the necessary repairs, and provided also that the tenant has not been guilty of such negligence as to bar a recovery by him. When the landlord is notified that the premises are out of repair, it becomes his duty to inspect and investigate, in order that he may make such repairs as the safety of the tenant requires. It follows, therefore, that when, after such notice, the landlord fails, within a reasonable time, to make the repairs, he is chargeable with notice of all the defects that a proper inspection would have disclosed. To this extent he might be charged with liability for injury arising from a defect which was hidden so far as the tenant was concerned. When rented premises become out of repair, it is the duty of the tenant to notify the landlord of

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this fact, and also to abstain from using any part of the premises, the use of which would be attended with danger. But even after notice to the landlord the tenant has a right to use those parts of the premises which are apparently in good condition, if there is nothing to call his attention to what may be a hidden defect." Cited, 112/904.

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CHAPTER 28.

OWNER OF LAND TO KEEP PREMISES SAFE.

447. When owner is bound to keep his premises safe, Code, § 4420 (3824).
448. The principle stated.
449. Excavations adjacent to a sidewalk.
450. Pitfall on uninclosed lot.
451. Nuisance on inclosed lot.
452. Excavation in rear of a storehouse.
453. Defective steps attached to a storehouse.
454. One entered a building uninvited and was hurt going out.

447. Owner bound to keep premises safe, when.

Where the owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries occasioned by his failure to exercise ordinary care in keeping the premises and approaches safe. Code, § 4420 (3824).

In *Mandeville Mills v. Dale*, 2 G. A. 607, it was held that the elements of legal liability of the owner or proprietor of premises for injuries occasioned to persons thereon, vary according to whether the person injured was, at the time of the injury, a trespasser, a licensee, a visitor under invitation, express or implied, or a person standing in some special relation recognized by law. Under the allegations of the petition in the present case, the injured person was a visitor by invitation, upon the defendant's premises. When the owner or proprietor of premises, by invitation, express or implied, induces or leads others to come upon his premises for a lawful purpose, he is liable in damages to such persons for injuries occasioned by his failure to exercise ordinary care in keeping the premises and approaches safe for such use. Powell, J., said: "We quote from *Sweeny v. Old Colony R. Co.*, 92 Mass. (10 Allen) 373 (87 Am. Dec. 644): 'The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurements or inducements, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty

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or impose an obligation on the part of the owner, or one in possession, to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by the owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use; and for a breach of this obligation he is liable in damages to a person injured thereby.' It is likewise said, in *Turess v. New York R. Co.*, 61 N. J. Law 314 (40 Atl. 614): "Invitations" is a term whose legal import is known, and may be used to express the relation between an owner or occupier of land and one who comes thereon under certain circumstances. The invitation which creates such a relation may be express, as when the owner or occupier of lands by words invites another to come on it, or make use of it or something thereon; or it may be implied, as when such owner or occupier, by acts or conduct, leads another to believe the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used.' The distinction between the duty to a licensee and to one entering the premises under invitation is thus expressed in *Beehler v. Daniels*, 18 R. I. 563, 565 (29 Atl. 6, 27 L. R. A. 512, 49 Am. St. R. 790): "There is a clear distinction between a "license" and an "invitation" to enter premises, and an equally clear distinction as to the duty of an owner in the two cases. An owner owes to a licensee no duty as to the condition of premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or wilfully cause him harm; while to one invited he is under obligation for reasonable security for the purposes of the invitation.' Mere permission to

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enter the premises creates the relation of licensee; invitation, express or implied, is necessary to create the more responsible relation and the consequent higher duty upon the owner or proprietor. In this class of cases wilfulness or wantonness is not necessary to the existence of liability, but merely ordinary neglect, either through act of omission or of commission." Cited, 3 G. A. 165; 5 G. A. 150.

A customer of a "soft drink," billiard, and pool room, or other like place, is there by the invitation of the proprietor, and, while therein lawfully engaged, it is the duty of the proprietor to protect him from injury caused by the misconduct, not only of his own employees, but of other customers and third persons. If, therefore, there is any reasonable apprehension of danger to such a customer from the unlawful conduct of other customers or third persons, or if a personal injury from the misconduct of other customers or third persons can be prevented by the proprietor by the exercise of ordinary care and diligence, he may be guilty of negligence for his failure to use it, and consequently responsible in damages. The duty assumed by the owner of a place of amusement or recreation where the public are invited, for his profit and their pleasure, is analogous to that which the law imposes upon carriers of passengers, differing only in the standard of care required. In the latter, the standard is extraordinary care; and in the former, ordinary care. *Moon v. Smith, et al.*, 6 G. A. 649. Cited, 135/639. When this case appeared again, 7 G. A. 675, it was held that the court erred in granting a nonsuit. The fact that the plaintiff was himself at the time of his injury engaged in an act violative of the penal laws of this State (in this case, gaming) does not preclude his recovery for damage resulting to him from the negligence of another, provided that his unlawful act did not proximately contribute to bringing about his injury. 29 Cyc. 125; *Johnson*, 4 G. A. 742, 745 (62 S. E. 491); *Norris v. Litchfield*, 35 N. H. 271 (69 Am. D. 546).

In *Owens*, 123/393, it was held that a railroad company owes to one who comes to its passenger station to receive a friend or guest upon arrival ordinary care for his safety while at the station, and is liable for an injury resulting from the negligence of an employee in the handling of baggage. *Cobb, J.*, said: "One who expressly or impliedly invites another upon his premises is bound to see that they are in such condition that the person invited may approach and remain thereon

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in safety. This rule applies to railroad companies. A person who enters the premises of a railroad company for the purpose of transacting business with its agent is lawfully upon the premises, and the company owes him a duty to keep the premises in safe condition. *Richmond*, 98/495. A railroad company owes a duty to keep its passenger station in safe condition, not only to those who come there for the purpose of embarking upon trains, or those who use the station in alighting from trains, but also to those who may accompany others about to become passengers, or who resort there for the purpose of meeting incoming passengers. The company owes to one who goes to its station for the purpose of meeting an incoming passenger the same duty, in regard to the station and the conduct of its employees thereat, as it does to any person going there for the purpose of transacting business with an agent of the company. While such a person is not a passenger, the company owes to him ordinary care for his safety, and will be liable to him if he is injured as a result of ordinary neglect on the part of the agent or servants of the company."

In *Pacetti*, 6 G. A. 97, it was held that in a petition seeking damages on account of negligence, an allegation that the defendant "knew or ought to have known" of a matter, knowledge of which is essential to raise the duty and the consequent liability for neglect, is equivocal, and will be construed as asserting merely the conclusion of the pleader that the defendant had constructive knowledge. Such an allegation is permissible, however, when the petition alleges specific facts showing a relationship or a set of circumstances which imposes upon the defendant a duty to anticipate or to know of the thing in question. The facts set forth in the present petition were adequate to show a violated duty of anticipation. Persons confronted by a dangerous situation or by an emergency or other circumstances likely to impair judgment and ordinary discretion are not held to the same quantum of care as they would be otherwise. The question as to whether the plaintiff was guilty of such contributory negligence as to defeat her cause of action for the defendant's negligence is issuable, under the facts alleged in the petition. It was alleged that the plaintiff stood near one of the gates which led from the general waiting room to the train shed at defendant's station. The crowd to the rear of the plaintiff, seeing that the gate was about to be opened, and thinking that all who

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wished would be permitted to enter, surged forward and pushed against the plaintiff, and she was being pushed in the direction of the gate, when, for the purpose of lessening the blow which would ensue from the pushing of her body against the gate, she extended her left arm and hand, and placed it against the gate. While the plaintiff's hand was thus on the movable framework of the gate, "in plain view of the gatekeeper," he opened it violently, and, as the bars closed up, her thumb was caught between two of the bars. The gatekeeper in opening said gate while your petitioner was crushed up against the same, knew that to open the gate would be to inflict injury upon your petitioner. Said gatekeeper knew, or, in the exercise of ordinary care, should have known, that your petitioner's hand was on the gate at the time the same was opened, and recklessly disregarded your petitioner's safety and welfare." Powell, J., said: "The proposition is presented that the petition is defective, in that the gateman's knowledge of the presence of the plaintiff's hand upon the gate is alleged in the alternative,—that 'he knew or in the exercise of ordinary care should have known that the petitioner's hand was upon the gate at the time the same was opened;' and that this allegation, under a familiar rule of construction, will be held to mean simply that it was the gateman's duty to know and not that he actually did know. See *Southern Bell Tel. Co. v. Starnes*, 122/604 (50 S. E. 343); *Babcock Lumber Co. v. Johnson*, 120/1030 (48 S. E. 438). It is true that when a petition, in alleging the element of the knowledge of the defendant or his agent, as one of the ingredients of the negligence complained of, leaves it doubtful whether the knowledge was actual or constructive, the petition as a whole must set up such a state of facts as *prima facie* will show a duty (arising from the relationship existing between the parties as asserted, or from the particular circumstances surrounding the transaction) that the defendant or his agent should have known. In other words, to state it differently, in that class of cases in which the duty of anticipation is normally absent, the plaintiff, in order to assert a valid cause of action, must state unequivocally that the defendant had actual knowledge, or else must set up such a state of facts and circumstances as would take the case out of the normal, and raise the duty where it otherwise would not exist. We think that the present petition does this. Normally, perhaps, a gatekeeper at a railway station would not be called upon to anticipate that any one standing near the gate would have his hands on it. But cir-

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cumstances alter cases. Under the petition this was not a normal or ordinary occasion. A crowd of people were surging down the lobby toward the gate. The plaintiff in front of them was being pushed against the gate. The conduct of persons jostled about in a crowd is not usually the same as it would be under normal circumstances. Gatekeepers, guards, trainmen, and others whose movements are to be performed in the range of a crowd of people must of necessity use more caution than they would at other times. It is alleged that the plaintiff's hand was upon the gate in plain view of the gateman. The plaintiff's person was about to be crushed against the gate; and the crowd was pressing her on. It will not do to say under such circumstances the gatekeeper acted prudently and without negligence in opening the gate without stopping to see whether he could do so without injury to the plaintiff or others who might be pressed up against it. It is said, however, that the plaintiff's cause of action fails because of her contributory negligence in placing her hand upon the gate. To our minds this is a more doubtful proposition than the one we have just discussed. It would seem that a person of ordinary intelligence and prudence would not place his hand upon a collapsible iron gate about to be opened, when the opening of it would probably inflict injury upon the hand. As we have said above, however, the plaintiff was not acting under ordinary circumstances. It became necessary for her to throw out her hands, in order to keep her body from being crushed against the gate. We are unwilling to say as a matter of law that she went beyond the limits of common prudence in doing this. She may have reasonably believed that if she threw her hand upon the gate in plain view of the gateman, he would desist from his previously manifested purpose of opening the gate, until she had opportunity of extricating herself from the position in which the crush of the crowd had involved her. A person threatened with an imminent danger is not held to the same circumspection of conduct that he would be held to if he were acting without the compulsion of the emergency. A person has a right to choose even a dangerous course, if that course seem the safest one under the circumstances. Our conclusion is that the question of the plaintiff's contributory negligence is issuable, and, under the facts stated in the petition, it should be submitted to the jury." Mrs. Pacetti was an invited guest and defendant owed her the duty of exercising ordinary care and diligence to secure her safety. Cited, 6 G. A. 188.

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In *Rollestone v. Cassiner & Company*, 3 G. A. 161, it was held that usually, as against the proprietor of a public place of business and in favor of those who come there to trade, the law will imply an invitation from the former to the latter to enter the premises, so as to render applicable the principles of § 4420 (3824) of the Code. However, since in this State it is criminal for a barkeeper to sell intoxicating liquor to a drunk man, the law will not, in the absence of a showing of any contrary agreement or custom, or other similar reason; presume an invitation from a barkeeper to a drunk man to enter the saloon for the purpose of buying whisky. A member of the general public of the class usually allowed to enter the barroom, who lawfully and peaceably goes in, although not a customer actual or anticipatory at the time, does not, unless admission has been forbidden him, thereby become a trespasser, but is a licensee. The allegations in this case show the deceased to have been at least a licensee in the saloon of the defendant. The owner or proprietor of the premises is not free from duty to a licensee; he must keep the premises free from pitfalls, man-traps and the like. The exact duty owing by the proprietor to the licensee is a matter determinable only by the specific circumstances of each case. If the proprietor knows that a pitfall or some similar secret danger lurks in his premises, and sees a licensee about to come into contact therewith, he should give warning. The duty of warning against such danger becomes the more imperative when the licensee has bad eyesight, is intoxicated, or is suffering from other infirmity known to the proprietor. Heavy articles which are apparently in stable equilibrium or which appear to be securely fastened, but which in fact are in unstable equilibrium and not fastened, may fairly be placed in the same category with pitfalls and man-traps. Cited, 6 G. A. 100.

The proprietor of a barroom had therein a heavy bar-counter which was so constructed that it was top-heavy on the outer edge, and was therefore in a state of unstable equilibrium and liable to topple as a result of any slight contact, and which ordinarily was securely fastened to the floor, but which on the occasion in question was unfastened; a drunk licensee entered the saloon and, approaching the counter, stumbled, and, to catch or steady himself, took hold of and pulled against the counter, which he supposed to be fastened as usual, but which fell upon him and killed him. Held, that the negligence of the defendant and the contributory negligence

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of the deceased were both questions for the jury, and that the court improperly sustained a general demurrer. *Rollestone v. Cassiner & Co.*, 3 G. A. 161.

In *Bennett*, 6 G. A. 185, it was held that in a suit to recover damages for personal injuries received by a passenger from the sudden slamming of a car door by a servant of a railway company, in order to show a cause of action it is not necessary to allege that the servant had actual knowledge of the dangerous position of the passenger at the time the injuries were received, or that the act of the servant was intentional. Negligent ignorance on the part of the servant, in connection with the act which caused the injury, may be sufficient to warrant a recovery. *Hill, C. J.*, said: "The questions in this case are fully covered by *Pacetti's case*," *supra*.

Across a bridge for pedestrians in the city of Macon, owned and maintained by the Central of Georgia Railway Company, there ran a "large pipe, used for water or other purposes by the water company." This pipe was enclosed in a wooden box for the entire length of the bridge. The box was about two feet wide across the top, and about one foot distant from a railing which ran along the edge of the bridge. The plaintiff, while crossing the bridge, stopped and sat down on the box to rest. While thus resting himself, he leaned back, intending to recline against the railing of the bridge, "when he suddenly went backward and downward through an opening in the railing," and sustained injuries described. It was alleged that the railroad company had negligently failed to keep the bridge in repair, and that the main horizontal plank of the railing had rotted and fallen away; and to this alleged negligence the plaintiff's injuries were ascribed. The petition, of which the foregoing is the substance, was dismissed on demurrer. It was held that the owner of a bridge is not liable in damages to one who is injured by falling therefrom in consequence of his having negligently put the bridge to a use for which it was not intended, it appearing that but for such improper use of the bridge the plaintiff would not have been injured. *Knowles*, 118/795. To the same effect, *Jenkins*, 124/968.

A railway company is not, relatively to one who has no business to transact with it but who goes to its station at the instance of a third person to look after some private property which he has, without the company's permission, stored in a warehouse which it has practically abandoned and allowed to become out of repair,

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under any duty to keep the building and its approaches in a safe condition for use by persons entering or leaving the same. Wheeler, 123/41.

448. The principle stated.

If a railroad company, for the accommodation of the public, builds and undertakes to keep in repair, a bridge over an approach to a private road-crossing, it is such an invitation to the public to use it as will render the company liable for injuries resulting from defects negligently permitted to exist or remain in the bridge or approach, and it does not matter whether the crossing was one that the company was required by the statute to keep in repair or not. The principle is this: When the owner or occupier of land, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries occasioned by the unsafe condition of the land or its approaches, and under such an express or implied invitation, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit. This case is distinguished from Cox, *supra*, 68/446. Robertson, 95/430. Cited, 97/721; 98/784; 110/780; 2 G. A. 607; 8 G. A. 826.

Where a railroad company builds and undertakes to keep in repair a bridge over, or an approach to, a private crossing which is generally used by the public with the knowledge of the company, this constitutes an invitation to the public to use the bridge and approach, and renders the railroad company liable for injuries resulting from defects negligently permitted to exist in the bridge or approach, even though it be not affirmatively shown that the crossing is one which the railroad company is compelled by statute to keep in safe order and condition. Robertson, 95/430 (22 S. E. 551); Hooper, 110/779 (36 S. E. 232); Parker, 8 G. A. 826.

In Hooper, 110/779, it was held that the building and keeping in repair by a railroad company of a bridge over an approach to a private crossing is such an invitation to the public to use the same as renders the company liable for injuries resulting from defects negligently permitted to exist or remain in the structure. Cited, 8 G. A. 826.

In King, 107/754, the plaintiff alleges that he became a passenger on the train of the defendant at Milledgeville, for the purpose of being carried to Savannah, Georgia, and arrived at Gordon, a sta-

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tion on defendant's railroad, in the evening, and having to remain over until 12:15 the next day in order to take the train for Savannah, he went to a hotel in the town of Gordon. After night, desiring to go to a particular store in the town, he made inquiries as to the route, and was directed by a gentleman at the hotel to go to the warehouse across the railroad-tracks of the defendant, from where he could easily reach the store which he sought; that at the warehouse there was a light. Acting on this information, he started in the direction of the warehouse, expecting to cross the railroad-track, and not knowing that the track was in a cut, nor of the existence of a brick wall abutting the street, but before reaching the track he unknowingly stepped from a brick wall about five or six feet in height, falling that distance to the ground, in which were the tracks of the railroad company. At the point on the right of way of the defendant, where the injury was received, the tracks are in a cut, on the northern side of which was built a brick wall extending along a public street which ran parallel with the right of way for several hundred feet, the top of which was on a level with the street in front of the hotel from where petitioner started. Immediately in front of the hotel, and just at the street, steps were built by the defendant for the use of the public for the purpose of ingress and egress to and from the railroad-tracks and warehouse, and this was the usual route traveled by pedestrians. Little, J., said: "If the owner or occupant of lands, by any enticement, allurements, or inducement, causes others to come upon the same, he owes a duty to such persons to use reasonable care to see that the premises are safe for that purpose, and is liable for injuries caused by the violation of such duty to one who is free from contributory negligence. 3 Elliott on Railroads, § 1249. "To come under an implied invitation as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant." 156 Mass. 426. In this case the plaintiff in error, confessedly, did not seek to go upon the track nor to the warehouse of the defendant on business, but, following directions, he sought to reach the warehouse as being a point near the store which he desired to visit; and his claim that he went upon the premises of the

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defendant by invitation is not sound in law, under the allegation which he makes. Besides, the plaintiff in error, even if an invitation had been extended, did not use the steps by which the invitation was extended. He wandered from the path which led to the steps, and failed to accept the invitation, if one had been made by the erection of the steps." Cited, 128/604.

449. Excavations adjacent to a sidewalk.

In *Folsom v. Lewis*, 85/146, it appeared that Folsom kept a restaurant on Marietta street. Lewis went there, ate his supper and came out upon the sidewalk. He saw something in a show-window of the restaurant that attracted his attention. The window was immediately above a flight of steps leading down from the edge of the sidewalk into a cellar of the restaurant building. The cellar was leased by Folsom and was used by him in connection with his restaurant. There had been put over the opening made by this stairway a platform of planks, but it did not cover the whole space between the sidewalk and that portion of the building. Lewis stepped up to see what it was that had attracted his attention in the window, and walked into the opening and was injured. The court charged the jury: "If you believe that the defendant knew, or by ordinary diligence could have known of this opening, and negligently permitted it to be there, that there was a window over said platform, which window was in front of a restaurant kept by defendant on said premises, that the defendant had, at that time, displayed in said window such articles as would attract the attention of persons passing along said street and induce them to approach and inspect the same, and that the plaintiff, seeing these articles and wishing to examine them, walked with due care upon the platform for the purpose, and fell into the opening and was injured, you should find that the plaintiff had a cause of action against the defendant. This would be true though the platform was not constructed by the defendant, but by some other person to whom he had rented the privilege of keeping a stand in front of the window, if the platform was left at times so as to be an approach to the window." This charge was held to be correct, and that it was no defense to Folsom that he let the opening above the cellar to another person for the purpose of establishing a stand to sell various articles, and that the negligence was chargeable to that other; although he might also be liable.

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In *Collier v. Hyatt*, 110/317, it was held that where, in an action for personal injuries against several defendants, the plaintiff's petition alleged, in substance, that one of the defendants was the owner and lessor of a building which abutted upon the sidewalk of a public street, and, for the convenience and use of the tenants thereof, maintained an excavation or coal-hole opening from the sidewalk to the cellar or basement of the building, the covering of which hole was on a level with, and formed a part of, the sidewalk; that by reason of his negligence such covering was unsafe and dangerous to persons traveling on the sidewalk, and he, having for months actual notice of this fact, allowed it to remain in this defective and dangerous condition; that the plaintiff, thinking such covering was securely fixed and safe, stepped upon it, and was precipitated through the hole to the cellar below, thereby sustaining serious injuries—a cause of action against the owner of the building was set forth, and a general demurrer by him to the petition was properly overruled by the court.

450. Pitfall on uninclosed lot.

On the lot of the defendant company was a dry well. It was so covered by rubbish and grass and weeds growing over it, that ordinary care and observation would not have discerned it. The fence around the lot was partly down. Plaintiff turned his horse out to graze, he went into the lot, fell into the hole and was killed. The owner of property must so use it as not to injure or endanger the property of other persons. This dangerous pitfall should have been securely inclosed, and it was culpable negligence to have left it in the condition it was in. The presumption of law is that the owner of a lot is acquainted with the condition of his own property, if a natural person, and, if an artificial one, that it has such knowledge through its agents and employees. *Nelson*, 48/152.

A, the owner of a mule, hired it to B, who placed it in an ordinarily safe inclosure. The mule broke out of this inclosure at night and wandered on to an uninclosed vacant lot of C, then in the possession of D as a tenant. The vacant lot was in the town of East Point. On this vacant lot was an old unprotected well, into which the mule fell, and he was killed. Suit for the value of the mule was brought by A against the town and against B, C, and D, as joint tort-feasors. Held, the action did not lie, and a nonsuit was properly granted. The town was not liable, because the accident was

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not on the highway. The owner of the vacant lot, or his tenant, was not liable, because as to them the mule was a trespasser, and they owed no duty to the owner thereof to keep the well inclosed. The hirer of the mule was not liable, because he placed the mule in an ordinarily safe inclosure. The inherent viciousness of the mule alone was the proximate cause of its death, and the case is *damnum absque injuria*. Weeks, *Damnum Absque Injuria*, § 9; *Blyth v. Topham Cro.* Jac. 158; 1 Rol. Ab. 88; *Howland v. Vincent*, 10 Metc. (Mass.) 371 (43 Am. D. 442). *Garner v. Town of East Point, et al.*, 7 G. A. 630.

451. Nuisance on inclosed premises, or land abutting a highway.

In *Hutson v. King*, 95/271, it appeared that the defendant was the owner of a lot fronting on Broad street in the city of Augusta, with a door and window fronting on Broad street and immediately adjacent to the sidewalk; there was, under the building, a cellar. The building was destroyed by fire. The defendant left the walls standing without barricades to the open door and window. The plaintiff, a visitor to the city, while passing along Broad street, at night, saw the open door and assuming that it led to some retired spot, he undertook, in response to a call of nature, to enter, and immediately fell from the sidewalk into the cellar, inflicting upon him bodily injuries. It was held that the mere maintenance of a dangerous nuisance upon one's inclosed premises gives no right of action to another, who, without necessity, and without invitation from the owner, either express or implied, voluntarily deviates from a public highway adjacent thereto, and entering upon such premises, is injured in consequence of the existence of such nuisance. If the nuisance complained of be per se of such an obviously dangerous character as that a person of reasonable discretion, entering upon the premises of another, inclosed or uninclosed, either from necessity or upon invitation, express or implied, could readily perceive its danger, and, in so entering such premises, should suffer injury which he, by the exercise of ordinary care, could have prevented or avoided, he can not recover. It is the duty of the owner of premises so to inclose a cellar thereon which lies in dangerous proximity to a public street as to afford to one passing along such street, in the exercise of ordinary care, reasonable immunity against the danger of casually falling therein. If the owner fail to perform this duty,

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and a person exercising such care so falls and is injured, he is entitled to recover from the owner damages therefor. Atkinson, J., said: "Every man has a right to presume that upon his own premises, guarded by a clearly marked and clearly defined inclosure, other persons will respect his rights of property, and will not intrude upon the privacy thereof; and if upon such premises he maintains a dangerous nuisance, as a pitfall or other like contrivance, and a stranger, without invitation, either express or implied, enters thereon, he should take all those risks resulting from mere negligence of the owner which he may encounter on the venture. With reference to uninclosed premises, a different rule prevails; and if, upon such premises, the owner shall maintain a dangerous nuisance, in such situation as that persons lawfully entering thereon, without fault upon their own part, suffer injury, he is answerable in damages. The negligence of the plaintiff which defeats his recovery upon these three counts consists in the exposure of himself voluntarily to the hazard of going into the building at all, without reference to whether he was using ordinary care in the effort to get in. If a man going upon the premises of another should see an open well, and should voluntarily attempt to descend to its bottom, exercising the most extreme care and caution, but, in the descent, should fall and receive injuries, he could not recover, not because he was wanting in care or caution in making the descent, but because it was manifestly dangerous and hazardous to attempt the descent at all. So, in this case, it could make no difference how careful this plaintiff was as he walked along the sidewalk or how carefully guarded were his footsteps as he walked into the dilapidated building—he could not recover, because, thus voluntarily exposing himself to an unnecessary hazard, he assumed the risks of the hazard; and, being injured, he must abide the consequences. Whatever may be the duty of an owner of premises, with reference to persons who unlawfully intrude thereon, such owner has no right to maintain upon his premises any dangerous nuisance which might imperil the lives of those persons who, from lawful necessity or convenience might pass along, and by accident or some superior force, and without fault upon their own part, fall or be thrown from the sidewalk, or from a public thoroughfare, into such excavation. A man must so guard his premises situated immediately adjacent to a public highway as that one who of necessity deviates slightly therefrom may not be injured." Cited, 126/524.

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In *City Council of Augusta v. Dozier*, 126/524, it was held that the petition set forth a cause of action and the demurrer to the same was properly overruled. Cobb, P. J., said: "The city of Augusta is the owner of the canal and the land upon which the body of water known as Lake Olmstead is situated. This land adjoins a public highway. The city therefore owes to travellers upon the highway the same duty that any owner of land adjoining a highway owes to travellers thereon. What is the duty of such an owner to travellers on an adjacent highway? An owner of land abutting upon a highway is liable to travellers for injuries resulting from the maintenance of those things upon his property which are likely to render travel upon the highway unsafe. Many of the cases in which the rule is announced involved excavations on the land adjoining the highway, but the rule is of course not limited to cases where the injury resulted from an excavation. If the public lay out a highway so near a natural watercourse on the land of an adjacent proprietor that travel along the highway is rendered unsafe on account of the proximity of the stream, it may be that the owner of the stream would be under no obligation to erect rails or guards along the course of the stream; but when the owner creates and maintains upon his land an artificial lake or body of water so near the highway and so located relatively to the same that travel thereon is rendered unsafe, a duty to so guard the same that travellers in the exercise of due diligence will not fall or be precipitated therein devolves upon the owner. *Hutson v. King*, 95/271 (3); 15 Am. & Eng. Enc. Law (2d ed.), p. 437, and cases cited. The distance from the highway to that which caused the injury will in many cases determine whether there was a duty to guard the highway. When the adjacent land is level or practically so, and that which caused the injury is so far removed that a traveller in the exercise of due care would not have been injured thereby, no duty to the traveller would arise. Where the land is precipitous, a duty to the traveller arises in cases where under other conditions no duty would arise. The edge of the lake was sixteen feet below the highway, and forty-five feet therefrom. The slope began at the edge of the highway, and about two thirds of the distance is a very sharp incline of forty-five to fifty degrees, and thence to the water's edge about half that extent. The edge of the highway is protected at one place by a substantial fence, and at another place by large iron pipes; but between the points where the fence ends and the pipes

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begin there is a gap of thirty feet which is entirely unprotected, and is at the very crest of a steep declivity extending to the water's edge. This gap was at one time protected by a fence which had disappeared and had never been replaced. The husband of the plaintiff was walking along the highway at night, walked into the gap, was precipitated down the declivity into the lake, and was drowned therein. The averments of the petition were sufficient to raise a duty on the part of the city to guard the highway at the point where the deceased departed therefrom, and also to show that he was in the exercise of due care. Such being the case, a cause of action was set forth."

452. Excavation in rear of a storehouse.

Kohn was the owner of a storehouse and lot in the city of Rome. He left, at the rear of the house, an excavation walled up for the purpose of giving light to the cellar. Lovett, on an alarm of fire, went to Kohn's store, which adjoined the one in which the fire was, entered at the front door, went through the store and the back door and turned off the gangway, across the opening, fell in, and was injured. It was held that the digging of the open space by Kohn on his own ground was a lawful act and he had the right to keep it there as an appurtenant right for the use of his property, and, as it was not near to a public street or crossing, Lovett's falling in by accident gave no right to recover damages from Kohn as a wrong-doer. It was *damnum absque injuria*. *Kohn v. Lovett*, 44/251.

453. Defective steps attached to a storehouse, and negligence at a public gin.

In *Archer v. Blalock*, 97/719, it was held that the declaration, as amended, alleging in substance that the plaintiff suffered personal injuries because of the defective and dangerous condition of certain steps attached to a storehouse belonging to the defendants, which they had rented to another; that the plaintiff, when injured, was using these steps in the due course of his business with the tenant; that the steps constituted a platform used in common with other storehouses belonging to and occupied by the defendants; and that the defective and dangerous condition of the steps was well known to the defendants, and they had sufficient opportunity to have the same repaired, but had neglected to do so—a cause of action was

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set forth, and it was error to dismiss the case on general demurrer. Cited, 119/219; 2 G. A. 607.

In *Horton & Smith v. Harvey*, 119/219, the petition alleged that the defendants were the owners of a public gin to which the plaintiff carried a load of seed-cotton, which they received from him to be ginned and packed; that after it had been ginned and packed he drove his wagon to the platform erected by the defendants to receive his cotton, which had been packed into a bale weighing about 500 pounds; that the defendants, having no proper machinery for lifting the bale, undertook to load it upon the wagon by hand, and shoved it off the ginnery platform to the wagon with great force and violence, so that by reason of this violence and the sudden motion given to the bale, it was thrown against the plaintiff and he was thereby thrown off his wagon, and his leg was broken, "by the careless and reckless conduct of the defendants," and without fault on his part. By amendment it was alleged that the defendants had a derrick or crane on the platform for loading cotton bales, but the crane had no rope or tackle, and was out of repair and could not be used; that the derrick, when rigged up with ropes, was a safe and the usual way of loading cotton bales, and that the failure to rig up the derrick and use it in loading the plaintiff's cotton was negligence on the part of the defendants, and caused the injury to the plaintiff. Lamar, J., said: "The plaintiff was not a mere licensee, but, having been invited to bring his cotton to be ginned at defendants' public ginnery, could recover damages for injuries occasioned by defendants' negligence while he was on the premises, even though the act was not reckless, willful, or grossly negligent. *Atlanta Cottonseed Oil Mills v. Coffey*, 80/145. While the petition was meager in its statement of facts, the charge that the cotton was shoved from the ginnery platform on to the wagon with great force and violence, thereby throwing it against the plaintiff and breaking his leg, set out a cause of action as against a general demurrer. The fact that there was no crane and no rope and tackle for lifting the cotton, and that the plaintiff knew thereof and by the exercise of ordinary care could have avoided the injury, were matters for defense. *Archer v. Blalock*, 97/719." It was held, that one who hauls his cotton to be ginned at a public ginnery is not a mere licensee, and may recover for damages when injured on the premises by the owner's negligence, even though they are not willfully and recklessly inflicted.

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454. Entered a building uninvited and was injured.

One who entered a building undergoing alterations, and who sustained personal injuries because of an attempt to make his exit therefrom through a window the framing of which was insecurely fastened, could not, though his entry was lawful, and though he honestly believed that in the existing condition of the premises it was safe and proper to use the window as a means of exit, hold the owner of the building liable for those injuries, when his presence therein was not by their invitation, either express or implied, and they in no way induced him to put the window in question to such a use. *Seward v. Draper*, 112/673.

In *O'Connor v. Brucker*, 117/451, it was held that the principle of the "turn-table cases" will not be extended. Where the door of a vacant house was left open, and a young child playing therein was injured by the fall of a window which was being raised by his companion, the owner is not liable therefor. Lamar, J., said: "It has been recently held by this court that the doctrine of the 'turn-table cases' will not be extended. *Beavers*, 113/398. In view of this decision it is doubtful whether the owner would be liable where a child had been injured after entering the door of a vacant house. But even if leaving the door open was an act of negligence, and an enticement to children, the owner would only be liable for the damages which naturally flowed from such act; as, for example, for injuries caused by a child falling through a hole in the floor, or from defects in the building. But where there was no defect in the building, where the windows were down, and where a companion attempted to lift the window-sash, and in so doing the window fell and injured the hand of the infant, the owner of the building is not responsible. If the gate to the yard had been left open and children had entered, and while at play one had accidentally dropped a brick or heavy object on a playmate, the landowner would not be responsible. The principle is not different where the injury occurred within the building. It was not negligence to let the window-sash remain unfastened; the fall of the window was not the proximate result of leaving open the door. The injury was caused by the independent and intervening act of the infant's playmate."

While a trespasser, notwithstanding his trespass, may not have redress for injuries inflicted upon him by the active negligence of

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the owner or occupant of the premises, yet, in order for the latter to be liable in damages for such injuries, he must, at the time of such negligence, have known, or had good reason to apprehend, the presence of the trespasser where he was likely to be thereby injured. *Rome Furnace Company v. Patterson*, 120/521; 122/777.

Injuries caused by vicious or dangerous animals.

CHAPTER 29.

INJURIES CAUSED BY VICIOUS OR DANGEROUS ANIMALS.

455. Vicious or dangerous animals, Code, § 4417 (3821).

456. Bitten by a ferocious dog in a back yard.

457. A horse bites one passing by on the sidewalk.

455. Vicious animals.

A person who owns or keeps a vicious or dangerous animal of any kind, and by the careless management of the same, or by allowing the same to go at liberty, another without fault on his part is injured thereby, such owner or keeper shall be liable in damages for such injury. Code, § 4417 (3821).

A vicious animal is any individual of a vicious species, or a vicious animal of a harmless species. *Phillips v. DeWald*, 79/732.

456. Bitten by a ferocious dog in a back yard, and on a street.

In *Conway v. Grant*, 88/40, it was held that one who, in a city, enters the back yard of another through an open gate on lawful business, and is bitten by ferocious dogs running loose in the yard, of which he has no notice, has a right of action against the owner if the latter knew that the dogs were accustomed to bite, and nevertheless permitted them to run loose in such yard, with the gate of the same standing open. *Bleckley, C. J.*, said: "The fault here referred to is not that of being a trespasser, but that of being in some way instrumental in provoking or bringing on the attack complained of. It must, at the same time, be understood that the right of redress of the injured person will be defeated if the injury was caused by his own fault. A person who irritates an animal, and is bitten or kicked in turn, is deemed in law to have consented to the damage sustained, and can not recover. But if the fault of the injured party had no necessary or natural and usual connection with the injury, operating to produce the injury as cause produces effect, the owner of the animal will be liable. For example, the defendant keeps upon his premises a ferocious dog, and the plaintiff, having no notice that such dog is there, trespasses in the daytime upon the premises, and the dog rushes upon him and bites him. The defendant is liable, since it is not the necessary or natural and usual consequence of a person's trespassing upon a man's premises by day that

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he should be attacked by a savage dog." Bigelow, Torts, pp. 249, 250. Though the gate was open, and the plaintiff was on lawful business, it may be that he had no strict legal right to enter the premises from the rear. But this would be no justification for leaving dangerous dogs loose on the premises to bite him or others that might so intrude.

Mrs. Bertha Goodman brought an action for damages against Sam. Friedman, alleging that while she "was proceeding quietly along Margaret Street," in the city of Savannah, "on her way home," she living on one side of this street and the defendant upon the other, and "as she got to a point on said street opposite his house, a vicious dog," of which the defendant was the owner or keeper, "sprang upon her and bit her severely, throwing her to the ground and fastening his teeth in her right breast, inflicting dangerous, severe, and painful wounds," and that she was also severely bitten in other places upon her body. She further alleged that the defendant knew of the viciousness of the animal, but failed and refused "to keep his dog shut up." Fish, J., said: "Defendant admitted in his answer that, on the day that the plaintiff was injured, the dog was turned loose by one of the hands on the place where he had left it, for the purpose of catching a sheep, and that it 'was perfectly natural,' when this was done, for the animal to run away and come back to its home in the city. If the 'perfectly natural' consequence of turning the dog loose in the country, to chase a sheep, was that it ran away and came back to its home in the city, then it necessarily follows that to thus allow the animal its freedom was to allow it to go at liberty, not only in the country but upon the street in the city of Savannah where it met and bit the plaintiff. And as the defendant was responsible for the want of care, or negligence, of those in whose keeping he had left the dog, when one of them allowed it to go at liberty, the defendant, in the eye of the law, allowed it to do so. The dog was at liberty, upon a public street in the city, when it attacked and injured the plaintiff. The defendant admitted this and that he was the keeper of the animal. It was shown that, before this, knowledge of the dog's dangerous and vicious propensity was brought home to the defendant. It would seem that these facts made out a prima facie case of negligence on the part of the defendant. But, admitting that they did not, the defendant undertook to show the kind and degree of care which he

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exercised to restrain the animal of its liberty, after notice of the attack which it had made on a member of the plaintiff's family, and, in so doing, he not only wholly failed to show any facts from which the jury would be authorized to find that he was not negligent, but, in effect, admitted that when the plaintiff was bitten the dog was at large upon the streets of Savannah because he had, through those for whose negligence he was responsible, allowed it to go at liberty." *Friedman v. Goodman*, 124/532.

457. A horse bites one passing by on the sidewalk.

In *Reed v. Southern Express Company*, 95/108, it was held that where an ordinary draft-horse attached to a vehicle is momentarily left standing in a street, adjacent to a sidewalk, and bites one passing by upon the sidewalk, the owner of the horse is not liable for the injury thus occasioned, it not appearing that the horse was or had ever been of a vicious nature, or that the owner had any reason to apprehend the animal would become so. *Simmons, C. J.*, said: "There is no general propensity on the part of horses to bite persons who come near them, and, when this is done at all, it is done by one that is exceptionally vicious. Where no such disposition has been discovered in a horse, the owner is under no obligation to anticipate that it will suddenly bite some passer-by who chances to come within its reach, and is not bound to guard against such an occurrence; and if the horse does bite somebody, and is not wrongfully in the place where this happens, the owner will not be held liable for the injury. The rule on this subject has been stated thus: 'If domestic animals, such as oxen and horses, injure any one in person or property when they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury, unless he knows they are accustomed to do mischief; and such knowledge must be alleged and proved. But, if they are wrongfully in the place where they do the mischief, the owner is liable, though he had no notice that they were accustomed to do so before.' 1 Am. & Eng. Enc. Law, art. 'Animals,' p. 578, and authorities cited. See, also, *Cooley, Torts* (2d ed. 402), pp. 341, 343. In this case it appears that the horse was in its rightful place in the street; and it not appearing that the defendant or its servant in charge of the horse had any reason to suppose, before the injury occurred, that the horse was vicious or had a tendency to bite persons, the injury was not one which the

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defendant was bound to anticipate and guard against; and the leaving of the horse unattended was not such negligence as would entitle the plaintiff to recover. Of course, if the horse had before manifested a disposition to bite people, and the defendant or its servant knew of it, it would be negligence to leave the horse standing near the sidewalk unattended."

Toll-bridges.

CHAPTER 30.

TOLL-BRIDGES.

458. Degree of diligence required of keeper of toll-bridge.

459. When the bridge is undergoing repairs.

460. When the relation of the owner to the public is suspended.

461. Plaintiff's negligence is matter of defense.

458. Toll-bridge—Degree of diligence required of keeper.

The owner of a bridge franchise is bound to exercise only such care and diligence in the construction of his bridge and the keeping the same in proper order, as every prudent man would exert in relation to the same property, in view of the object and purpose for which the same was erected and used by him. *Tift v. Townes*, 53/47. Cited, 64/313.

He is only liable for ordinary care and diligence, and beyond this is not an insurer. If he knows of a defect in the bridge, dangerous to passengers likely to result in damage, and the dangerous defect is not exposed so that the passenger can also see it, and taking toll from the passenger, allows him to cross without warning, he is liable for damages; aliter, if the defect is not dangerous and not likely to result in damage, but in the judgment of the proprietor slight and thought to have been safely repaired. *Stokes v. Tift*, 64/312.

It is the duty of the proprietor of a toll-bridge to exercise ordinary care for the keeping of his bridge in safe condition for travel, but he is not bound to go beyond this. *Tift v. Jones*, 74/469. Cited, 95/115.

459. When the bridge is undergoing repairs.

Where a bridge was in an unsafe condition and undergoing repairs, it would make no difference whether warning to the public was given or not, if all could see for themselves what was going on, and when the person injured actually did see the condition of the bridge. *Tift v. Jones*, 74/469.

460. When the relation of the owner to the public is suspended.

The proprietor of a toll-bridge is bound by law to keep the same in a safe condition, and to make all needful repairs, and he has a

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right to take up any portion of the bridge which it may be necessary to displace for the purpose of making such repairs. While such repairs are being made, and a large portion of the flooring of the bridge is taken off, and the timbers sustaining the floor are removed from their usual place, so as to be plainly seen by all persons, and the collection of toll is discontinued, the relation of the owner to the public as proprietor of a toll-bridge is suspended, and he is not liable to a passenger who attempts to cross the bridge on foot on planks temporarily laid down several feet apart, for the use of the workmen, and who is injured by falling between the planks thus placed, or through an opening caused by the removal of the timbers. *Tift v. Jones*, 52/538.

While generally it may be true that, if the rule of this bridge-owner is to take toll in advance for crossing and recrossing, and this rule is complied with by the traveler, the payment is as good as if made at each time of crossing, still if, between crossing and recrossing, the bridge has been torn up for repairs, and its use as a toll-bridge suspended, the fact that the traveler had paid his return fare when he first crossed would not, of itself, give him the right to recross, if he was warned or had knowledge of its unsafe condition. The payment of fare at the time of recrossing would have been evidence of the use of the bridge at the time as a toll-bridge, but the payment of return fare at the time of the first crossing was not such evidence. *Tift v. Jones*, 74/469. Cited, 95/115.

461. Plaintiff's negligence matter of defense.

When the plaintiff in an action against the owner of a toll-bridge proves his injury and the owner's negligence as alleged, he is not bound to go further and prove his own diligence, want of care on his part being matter of defense. *City Council v. Hudson*, 88/599. Cited, 99/282; 126/713; 135/637.

Suits against counties.

CHAPTER 31.

SUITS AGAINST COUNTIES.

- 463.** When a county is liable to suit.
463. County not liable for tort committed by guard or chain-gang superintendent.
464. Public bridges; condition of contractor's bond.
465. What must be shown to recover against a county on account of public bridges.
466. How long the liability continues.
467. A county bridge within the limits of an incorporated town.
468. Ordinary care and diligence must be exercised by injured person.

462. County, when liable to suit.

A county is not liable to suit for any cause of action unless made so by statute. Code, § 384 (341).

The liability of counties to be sued for damages is entirely statutory. They were not so liable at common law. They are political divisions, exercising a part of the sovereign power of the State; and they can not be sued except where it is so provided by statute. *County v. Flynt*, 80/489. Cited, 81/48; 85/424; 107/812. To the same effect, *Scales v. Ordinary*, etc., 41/225. Cited, 106/744.

In *Millwood v. DeKalb County*, 106/743, the plaintiff sued the county of DeKalb for damages, alleging that the county authorities had exercised the right they had under the law to work the convicts in the county chain-gang upon the public roads of the county; that a road, which crossed a private way, had been worked by the chain-gang in such a manner as that persons traveling the private way were liable to be injured; that in coming along such private way at night, having no knowledge of the condition in which the public road had been left at the point where the private way intersected it, she fell, and was injured. There were allegations that the county authorities had failed to provide railings or other safeguards to protect persons who were traveling along the private way. It was held that a county is not liable to suit unless made so by law; and this is true whether the alleged cause of action arises from the negligent performance of duties which the county authorities are compelled to perform, or a negligent discharge of duties voluntarily assumed in the exercise of a discretion vested in them by law. Cobb, J., said: "The correct position is this: The county being a political division

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of the State, is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring his suit." Cited, 111/314.

463. County not liable for tort committed by guard or chain-gang superintendent.

A county is not liable for a tort committed by a chain-gang superintendent in unlawfully imprisoning one and compelling him to work, although the same was done in obedience to instructions from the county authorities. There is, in this State, no statute rendering a county liable for any such cause of action. *Bailey v. County*, 111/313.

Nor is a county liable for the tort of one of the guards in unlawfully beating a convict in the chain-gang, nor for the negligence in the rest of the guards in not protecting the convict from the unlawful beating. *Hammond v. County of Richmond*, 72/188. Cited, 106/745.

464. Public bridges; condition of contractor's bond.

When a public bridge, ferry, turnpike, or causeway is let out, the contractor must in his bond make a condition also to keep it in good repair for at least seven years, and as many more years as the contract may be for: Provided, that such contract may be let out under existing laws without requiring the aforesaid condition in the contractor's bonds, if, in the opinion of the commissioners of roads and revenue, or of the ordinary in counties where there are no such commissioners, it would be to the public interest to dispense with said condition in said bond: Provided, however, that in every case the county shall be primarily liable for all injuries caused by reason of any defective bridges, whether erected by contractors or county authorities. Code, § 748 (603). The two provisos in this section are codifications of the Act of 1888. The provision of the Code, § 748 (603) making counties primarily liable for injuries caused by reason of any defective bridges, whether erected by contractors or by the county authorities, is not applicable to a bridge erected over a water-course which divides one county from another. To bridges of the latter class §§ 419 (367) and 423 (371) of the Code are applicable; and liability attaches only in accordance with § 768 (623) of that code, i. e., upon failure of the county to take a sufficient bond from

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the contractor. The eastern bank of Little river above the junction of the Withlacoochee river is the boundary line between Brooks and Lowndes counties. The entire stream lies in Brooks county. Nevertheless Little river is to be regarded as a watercourse dividing the two counties, within the purview of the Code, § 419 (367). *Brooks County v. Carrington*, 7 G. A. 225.

Code, § 748 (603) has no application to "public bridges over watercourses which divide one or more counties from each other," and consequently does not apply to such bridges. It is still the duty of county authorities, when contracting for the erection of a bridge of this kind, to require a bond of the contractor as prescribed in § 421 (369) of the Code; and it results that a petition against a county for damages resulting from an improperly constructed county-line bridge is fatally defective unless it alleges that the county authorities failed to take such a bond. *Willingham v. Elbert County*, 113/115. Cited, 7 G. A. 226.

The term bridge includes all the appurtenances necessary to its proper use, and embraces its abutments and approaches. That which is necessary as an approach, to connect the bridge with the highway, is an essential part of the bridge itself. An allegation in a petition brought against a county, to recover for damage caused by a defect in a bridge, that the road commissioners and overseers of roads in the district in which the bridge was located had notice of the defect, is an averment of notice to the county, which is good as against a general demurrer. *Howington v. Madison County*, 126/699.

The plaintiff in his suit for damages made substantially the following allegations: He was injured because of defects in a public bridge constructed by the defendant since December 29, 1888, and forming a part of the public road of the county. The bridge was over a branch, and water constantly ran under and through it. "In constructing said bridge the county authorities built the same out of terra cotta about 24 inches in diameter, and in the upper end of the same they made a solid stone abutment about three feet high and about eight feet long, so as to draw all the water to and force it through this opening under the bridge of 24 inches. That the county authorities covered the terra cotta bridge with dirt so as to conceal the same." The opening was inadequate to carry the water collecting above it, and as the water "ran over the bridge it washed out the dirt leaving a hole seven (7) feet long, eighteen inches wide, and twelve inches deep, on the top and side of the terra cotta

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bridge." The county authorities "had knowledge of the existence of said hole for more than two weeks, and had failed and refused to repair the same." While riding over the bridge on his bicycle it ran into the hole and threw him to the ground, thereby inflicting the injuries set forth, without his fault. Held, a county is not liable to suit unless there is a law which in express terms or by necessary implication so declares. *Millwood v. DeKalb County*, 106/743 (32 S. E. 577). Under the provisions of the Code, § 748 (603), declaring, "Provided, however, that in every case the county shall be primarily liable for all injuries caused by reason of any defective bridges, whether erected by contractors or county authorities," the county was not liable for the injuries set forth, as the injuries were not caused by reason of any defective bridge within the meaning of the word "bridges" employed in such section. *Parker v. Spalding County*, 134/69.

465. What must be shown to recover against a county on account of public bridges.

When the suit is brought against the county for damages caused by a want of proper repairs to a public bridge, it should appear that the bridge was erected by letting it out to the lowest bidder, and that no bond was taken from the contractor faithfully to perform his contract, and to indemnify for all damages occasioned by a failure so to do, and to keep the bridge in good repair for seven years, and for such further time as may be embraced in the contract—and both of these facts should be alleged in the declaration. *Collins v. Commissioners*, 54/25. Cited, 77/251. The declaration must also show that the claim sued for had been presented to the ordinary for auditing within twelve months from the time of the injuries, as required by § 410 (361) of the Code. The auditing referred to in the Code is not confined to any particular class of claims, but is applicable to all. *Maddox v. County of Randolph*, 65/216. Cited, 71/588. When thus presented, and payment is refused, the claim may be sued in a court having jurisdiction. The court of ordinary has not exclusive jurisdiction. *County of Cobb v. Adams*, 68/51.

A bridge spanning a stream, which is crossed by a public road, and constituting a portion of such road, is a "county bridge," though the work of constructing the same be done by private citizens, and a portion of the materials therefor be supplied by them, when the

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doing of such work, and the furnishing of such materials, is in pursuance of an agreement between them and the proper county authorities, who, under the terms thereof, supply the remaining materials needed for the structure. Semble, that it would be a "county bridge," though the citizens supplied all of the materials and built it with the permission of such authorities, or without such permission, where the latter, in behalf of the public, accepted the bridge, and allowed it to remain in place. A county wherein such a bridge has been erected under such an agreement since December 29, 1888, is liable for injuries resulting from the defective construction thereof, or from a failure by the county authorities to keep the same in repair. Lumpkin, P. J., said: "In the light of the last proviso of § 748 (603), embracing the positive declaration 'that in every case the county shall be primarily liable for all injuries caused by reason of any defective bridges, whether erected by contractors or county authorities,' it seems clear that the 'authority' vested in ordinaries by § 747 (602) carries with it the correlative duty of seeing to it that all county bridges are properly built and then kept in safe condition. The comprehensive words 'any defective bridges' were manifestly intended to include, not only bridges defectively built, but bridges out of repair, and it was plainly the legislative purpose to make counties liable for injuries resulting from a failure on the part of the proper authorities to observe either branch of the duty above indicated. The above-mentioned proviso was introduced into our statute law by the act of December 29, 1888, 'to amend section 671 of the Code of 1882,' etc. Acts 1888, p. 39. That section, as thus amended, was codified in § 748 (603) of the Political Code. The act referred to made a broad and sweeping enlargement of the liability of counties with regard to injuries of the character now under consideration." *Tattnall County v. Newton*, 112/779. Cited, 126/700.

The county is made liable for the neglect of its officers, or the omission of a legal duty imposed upon them by law, to wit: The failure to take a bond from the contractor. The contractor is liable whether he gives a bond or not, and the county is only liable when it fails to take a bond from the contractor. In order, therefore, to make out a case for recovery against the county, after proving the injury or damage, it will be necessary to show that it was injury for which the contractor was liable, and that the county authorities

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had failed to take from the contractor the bond and security which it ought to have taken. These two facts will fix liability upon the county, and nothing else will. The person damaged may sue the contractor or can sue the county, if no bond has been taken from him, without suing the contractor in the first instance. It is not necessary to sue the contractor to insolvency before he can sue the county. *Arnold v. Henry County*, 81/731. Cited, 107/812.

Where, prior to the passage of the act of 1888, a public bridge was constructed, under contract with the authorities of one county, across a stream dividing it from another (the authorities of the latter refusing to participate therein), it was the duty of the county authorities causing the construction of such bridge to take bond in accordance with § 768 (623) of the Code; and, failing so to do, the county for which they acted is liable for damages resulting to a traveler occasioned by a defect in such bridge, of which these authorities had timely notice. *Cook v. County of DeKalb*, 95/218. This case again, 97/415. Cited, 107/812; 7 G. A. 226.

In *Penick v. County of Morgan*, 131/385, the plaintiff brought suit against the County of Morgan, alleging, that since December 29, 1888, the county authorities of said county caused a bridge to be erected on one of its public roads; that while the plaintiff, with his wife and child, was driving across said bridge the bridge broke in the middle and fell through, causing the damages. The main question in the case was whether the road was a public road. It was held that where land is dedicated by its owner for public use as a public road, the county authorities having jurisdiction over roads can accept such dedication and open a new public road over it without complying with the requirements of the Code, § 640 (520). Any express dedication of land by the owner thereof for public use as a public road, and an express acceptance thereof by the proper county authorities, need not be shown; but such dedication and acceptance, respectively, may be shown by the acts of such owner and authorities. A dedication of land by the owner thereof for public use as a public road, and the use of such road by the public as a route of travel, without some recognition of such road on the part of the county authorities, would not make such road a public road. A *cul de sac* may be a public road. A book the contents of which state it is a road register of a certain county, and show entries describing a road as a public road, is not admissible, upon the trial of a case, to show such road was a public road several

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years prior to such trial, when there is nothing to show, or from which it can be inferred, when such entries were made. Where a county, in a suit against it, denies that a certain road is a public road, and there is evidence that the county superintendent of roads opened the road, built bridges on it, and worked it for several years thereafter, the minutes of the county commissioners having jurisdiction of roads showing that, upon an application to them to open the road and make it a public road, two of them were appointed a committee "to go over the ground and investigate it and report to the next meeting," and that "The committee appointed to look into the practicability of opening [such road] * * * report in favor of the same, and the report is adopted," are admissible, in connection with such oral testimony, to show that the county commissioners intended to open the road as a public road. Where it appeared that county commissioners having jurisdiction of roads appointed two of their body to open and lay out a public road, under the facts in this case it was not error to admit testimony that such two commissioners opened and laid out the road, or that they showed the county superintendent of roads where they laid it out. Where one of the questions involved in a case is whether or not a road was a public road at a particular time when an injury occurred, evidence that the county hands, under the county superintendent of roads, worked the road after such time, was admissible in connection with evidence that such road had been worked by the county authorities prior to such injury. Cited, 135/69.

The plaintiff sued the County of Butts to recover damages for injuries received on account of the defective condition of a public bridge built by the county authorities since December 29, 1888. She alleged that the insecure condition of a hand-railing on the side of the bridge, upon which she placed her hand for support while crossing the bridge at night, caused her to move towards the center of the bridge, and in doing so her foot became entangled in the rotten and jagged end of a beam on the floor of the bridge, causing her, without fault on her part, to fall and sustain the injuries for which she brought suit. She further alleged that the defective condition of the bridge was due to the negligence of the county authorities in failing to repair it after knowing, or being charged with knowledge, of its unsafe condition. The plaintiff obtained a verdict, and the defendant excepted to the court's refusal to grant

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its motion for a new trial. Held, where two acts of negligence concur in producing an injury, in the absence of either of which the injury would not have occurred, and both acts are chargeable to the same person, the doctrine of proximate cause is not applicable. And where acts charged as negligence consist in the failure to remedy two defects in a public bridge, which would not constitute negligence until the county authorities charged with the repair of such bridge had actual or constructive notice thereof, and both defects combine in causing an injury which would not have occurred had either not existed, the fact that the county authorities are charged with knowledge of only one of such defects will not excuse the county from liability. 1 Thompson on Negligence, § 69; *Kraut v. Frankfort, &c., R. Co.*, 160 Pa. 327 (28 Atl. 783). The following charge of the court: "In this case, if there was a defect in this bridge because of a beam placed there by authority of the county authorities, and it was suffered to decay and become rotten, and on that account it became dangerous, then if the county authorities, the county commissioners, had notice of it, or either of them, or if that condition remained for a sufficient length of time for them to discover it in the exercise of ordinary care, which would be notice to them, and if the plaintiff was injured on account of the defect, she would be entitled to recover," was not subject to the criticism that it was error "for the reason that it is not adjusted to the issues in this case. The plaintiff alleges in her petition and her proof tends to show that she came in contact with two defects in the bridge, the loose railing and the beams of wood laid across the bridge, and that both these defects contributed to her injury." Nor was such charge subject to the criticism that it was error because it "in effect instructs the jury that it was not necessary that the county authorities should have notice, either actual or constructive, of the defective condition of the railing which she alleges was defective, and which, according to her allegations and proof, contributed to her injury." *County of Butts v. Hixon*, 135/26.

In refusing to strike that portion of the defendant's plea which set up that the death of the plaintiff's child was the fault of the plaintiff herself in negligently and carelessly permitting the child to pass over the foot-bridge without the guidance of some other person, well knowing that the stream at that time was very much swollen and in a dangerous condition, and that the plaintiff aided and contributed to her own injury by allowing the child to enter

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upon said foot-bridge without some other person to guide the child and prevent her from falling, the court did not err, inasmuch as the defendant had the right to introduce evidence to show, if it could, that the mother was present, or at least in sight, at the time the child was drowned. While a mother who is compelled to earn her own living by her labor may not be required, in the exercise of due diligence, to be present at all times and personally overlook the care of her children, still she is responsible for the exercise of ordinary care for the safety of her child while the child is in her presence. Construed together, all of the instructions of the court tended to impress the jury that if the death of the child was due to a defect in the bridge of which the county authorities had knowledge or notice, the plaintiff's right of recovery could not be defeated. The instruction to the effect that the plaintiff was not entitled to recover unless the county authorities knew of the defect in the bridge, or unless this defective condition had existed for such a length of time that knowledge thereof on the part of the county authorities would be presumed, was correct. Under the evidence adduced, and, when taken in connection with the further instruction that if the bridge was originally negligently or defectively constructed, and any defect in the bridge was the cause of the child's death, the county would be liable, the charge afforded no ground for complaint. Whether the omission to replace guard-rails upon the bridge, if guard-rails were previously there, or the failure to put guard-rails upon the bridge in the first instance, was or was not negligence on the part of the county authorities, was a fact to be determined by the jury from the circumstances of the case. In any case in which it is contended that the circumstances of the transaction call for the application of the doctrine of *res ipsa loquitur*, the prerogative of the jury to judge whether the circumstances of the case itself are such as to raise an inference of negligence and to fix the liability upon the defendant for the act complained of (unless a satisfactory explanation is offered by him) is exclusive, and not reviewable. The jury were authorized in the present case to find that neither the condition of the bridge nor the other circumstances in the case placed upon the defendant the burden of proving how the casualty resulted and that it was due to the negligence of the county. It is the duty of the proper county authorities to construct and maintain bridges across streams in a workmanlike and proper manner, so that any person may use them with safety, in ordinary travel, but

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this duty is not one of extraordinary care and diligence, nor does its exercise extend to extraordinary occasions, beyond the ken of general experience. The law does not make the county authorities insurers of the safety of any of those who use bridges. It was not error to instruct the jury in substance that even though both the plaintiff and the defendant might be negligent, the plaintiff's right to recover would not be defeated if the death of the child was caused by the negligent condition of the bridge, and the child in crossing was using as much care as would be used by a person of full discretion. The charge of which complaint is made presented one of the strongest contentions of which the evidence in behalf of the plaintiff was susceptible. *Stamps v. Newton County*, 8 G. A. 229.

466. How long the liability continues.

Where a county let out the contract for building a bridge to the lowest bidder, but took no bond from the contractor, and the injury complained of occurred ten years after the time of building the bridge, there was no legal liability on the part of the county because of such injury. The contractor is liable for any damages that may be done to persons who are injured by reason of a defective bridge; and when the county authorities fail to take a bond or sufficient guaranty, the county is also liable. The liability of the contractor is to keep the bridge in good repair for seven years, whether he gives a bond for that purpose or not; and the liability on the county does not extend beyond that. *County of Monroe v. Flynt*, 80/489. Cited, 81/733; 95/220; 103/106; 107/812.

In *Dorsey v. Counties*, 90/72, plaintiff sued Bibb and Crawford counties for damages from the falling of a public bridge. The bridge was over a creek which is the line between the two counties. It was built about nine years previously, not under contract and not under bond. It fell because it was rotten. It was held that the Act of 1888, which is codified in the two provisos in § 748 (603) is not applicable to any county bridge erected before the passage of the act, and under the prior law the counties were not liable in cases like the one embraced in the record. Cited, 92/131; 103/107.

In *Helvingston v. Macon County*, 103/106, Simmons, C. J., said: "It appears from the record that the county of Macon had built, or caused to be built, a bridge over Camp Creek. The evidence indi-

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cates that there were two portions of the bridge—one over the main stream, and the other over a slough. This was done in 1882 or 1883. More than seven years thereafter both portions of the bridge were washed away—one washed away entirely, and the other so much so that it was impossible to cross it in a vehicle or on horseback, and difficult to cross on foot. The county authorities employed Joiner to rebuild the bridge. He did so by making an entirely new bridge over the main stream, and by replacing the arches of the bridge over the slough, and putting in 'some new sleepers, a new top, new banisters, and some abutting boards.' At the direction of one of the county commissioners, he used some of the old sleepers in rebuilding the bridge over the slough. These sleepers Joiner thought were insufficient, and defective, but he doubled them, so as to make them as strong as their defective condition would permit. In November, 1894, while the plaintiff was crossing, on a wagon loaded with cotton, that portion of the bridge which was over the slough, fell in by reason of the weakness and rottenness of the timbers, and plaintiff was thereby injured and damaged. She brought suit against the county, and on the trial of the case the judge, after hearing the facts, granted a nonsuit. Under the facts above recited, we think the court erred in granting the nonsuit. We think the question should have been submitted to a jury for them to determine from the evidence whether that portion of the bridge which fell in and injured the plaintiff was rebuilt by the county authorities, or simply repaired by them. If it was only repaired by Joiner, the erection of the bridge would date from 1882 or 1883, when it was first built, and the county would not be liable, because more than seven years had elapsed from the building to the time of the injury to the plaintiff. *Scales v. Chattahoochee Co.*, 41/225; *Monroe Co. v. Flynt*, *supra*. If, on the other hand, the bridge was rebuilt, and was practically a new bridge, and the county did not let out the building of such bridge to the lowest bidder, as authorized by law, taking from him a bond of sufficient guaranty, but, instead, had it built at their own direction, and without taking such bond, the county would be liable to the plaintiff for such injuries as she may have sustained, even though the Act of 1888 [Code, § 748 (603)] were not of force. That act is applicable to bridges built since its passage. *Bibb & Crawford Co. v. Dorsey*, *supra*. If this bridge was built by Joiner, this act, which we think constitutional, would be applicable, and the county primarily liable to the plaintiff." Cited, 107/812.

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Though it was the legal duty of the county authorities to take from the contractor for erecting a county bridge bond and good security to keep the bridge in good repair for at least seven years, yet, where the bond and security required and taken limited the period to three years, this, nothing to the contrary appearing or being alleged, may be treated as a "sufficient guaranty," contemplated by § 768 (623) of the Code, so as to exempt the county from liability for damages sustained within such period of three years by one who, in crossing the bridge, was injured in consequence of its defective condition or want of repairs, the bond taken being such as § 747 (602) of the Code specifies, and failing to conform to § 748 (603) only as to length of time for keeping the bridge in good repair. *Mappin v. County, etc.*, 92/130.

A county is liable for injuries caused by a defect in a county bridge constructed, either by contractors or by the county authorities, since the passage of the act of 1888, although the injuries occurred more than seven years after the bridge was constructed. *Hackney v. Coweta County*, 117/327. Cited, 118/202; 126/700.

The act of December 29, 1888, Code, § 748 (603) does not apply to bridges built before its passage, unless they have since that time been practically rebuilt. Whether the work done on them was merely a repairing, or amounted to a rebuilding, is a question of fact for the jury. County authorities are not insurers of the safety of county bridges, but are only bound to exercise ordinary care in maintaining and repairing them. *Warren County v. Evans*, 118/201. Cited, 126/701.

467. A county bridge within the limits of an incorporated town.

The fact that a bridge over a stream crossing a public road is located within the limits of an incorporated town does not of itself oust the county of control and management, and does not, therefore, impose upon the town any obligation to keep the bridge and its appurtenances in repair, if it be a county bridge. If it be recognized both by the county and the municipality as the property of the county, the county is bound to keep it in repair. The fact that the town authorities from time to time, voluntarily repaired the bridge and worked and kept up the embankment leading to it, does not change the title to the property or the legal duty devolving upon its owner, nor does such voluntary repair and uses make such a

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case of dedication by the county to the town as to change the title and legal duty to repair. A contiguous embankment necessary to make access to the bridge so as to pass teams and wagons over it is a part of the bridge, and title to the bridge and the duty to repair, extend to it. If the embankment was not a necessary part of the bridge, but was a part of the streets of the municipality, the town, and not the county, would be bound to keep it in repair, and whether it be the one or the other is a question of fact for the jury. *Daniels v. Mayor, etc.*, 54/79; 55/609. Cited, 126/701.

468. Ordinary care and diligence must be exercised by injured person.

Although a county may have failed to take from the contractor building a bridge a bond to keep it in repair, as required by law, yet if a person, whose mule was injured on such bridge, by the exercise of ordinary care and diligence, could have avoided the injury, he could not recover. *County v. Chapman*, 74/107. Cited, 95/290.

One who deliberately and intentionally drove at night upon a county bridge, with the condition of which he was perfectly familiar, and who, according to his own testimony, knew that the bridge was dangerous, because it had no guard-rails, was not, upon a petition alleging no negligence except failure to erect such rails, entitled to recover for injuries occasioned solely by reason of their absence. *Cooper v. County of Floyd*, 112/70.

In *Holliman v. Washington County*, 8 G. A. 718, it was held that the court erred in awarding a nonsuit and Powell, J., said: "This was a suit against a county to recover damages for personal injuries received by the plaintiff on account of his having been hurt by reason of a defective public bridge. The evidence, so far as it tended to show the defendant's negligence, was abundant. The court manifestly did not grant the nonsuit on account of the failure of the plaintiff to show that the defendant was negligent; he doubtless based his judgment on the proposition that the plaintiff had knowledge of the defect in the bridge, and that his use of it after knowledge precluded his recovery, either under the doctrine of contributory negligence or under the principle expressed in the maxim, *volenti non fit injuria*. It may be that the evidence was sufficient to authorize the judge to hold, as a matter of law, that the plaintiff either knew, or, from his opportunity to know, should have known,

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of the defect in the bridge, which consisted of a hole created by the rotting away of one of the planks in the flooring. The plaintiff was a R. F. D. carrier and had passed over the bridge some dozen or more times since the hole had come into existence. He said he had never seen it. But for the purposes of the question we are now discussing—whether the court should have granted a nonsuit—we do not deem the question of his knowledge or lack of knowledge controlling. The courts are rather liberal in not imputing contributory negligence to a traveler who uses a highway or bridge, notwithstanding he may have some knowledge of its defective condition. The case is rare where the question of the contributory negligence of the traveler can be solved by the court as a matter of law; in most cases it is exclusively a jury question. See *Harrell v. Macon*, 1 G. A. 413 (58 S. E. 124), and cases there cited. The somewhat deficient eyesight of the plaintiff, and the fact that he had his attention directed to the sorting of his mail and other circumstances appearing in the case, put this case very fairly within the general rule requiring the plaintiff's negligence to be submitted to the jury for determination. In underlying doctrine it is very similar to the case of *Mosheuvel v. District of Columbia*, 191 U. S. 247, though the two cases are not identical under their facts."

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CHAPTER 32.**ACTIONS AGAINST MUNICIPAL CORPORATIONS.**

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469. Municipal corporations not liable for discretionary acts.

Where municipal corporations are not liable by statute to perform

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an act, they can not be held liable for exercising their discretion in failing to perform the same. Code, § 896 (747).

470. When not liable for failure to light highways.

For discretionary acts, a municipal corporation is not liable; and when cities and towns are under no statutory obligations to light highways, they are not liable for a failure to do so. *Gaskins v. City of Atlanta*, 73/746.

471. For a negligent exercise of power they are liable.

There are many acts which are discretionary, and may or may not be done; as for instance, to open streets, grade sidewalks, dig sewers, build a bridge, provide water, and many other things for a failure to do which no action lies, how much soever private interests may suffer; yet when the discretion is used, and the work is done, if done so negligently, unskillfully as to damage other parties, then a right of action lies. But in no case, for the simple exercise of the power itself, disconnected from its negligent or unskillful execution, is the corporation responsible. *Rivers v. Augusta*, 65/376. Cited, 73/647; 110/92.

In *Tarbutton v. Town of Tennille*, 110/90, it was held that there is no obligation upon the authorities of a municipal corporation, towards any one of its citizens, to exercise the legislative discretion with which they are invested to enact ordinances prohibiting any specific act concerning the streets and sidewalks of the town. Such matters are left to their discretion, and a right of action against a city does not accrue to one who was injured by a person riding a bicycle on the sidewalk, because the authorities had failed to prohibit such riding.

472. For what municipal corporations are or are not liable.

Municipal corporations are not liable for failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance, of their ministerial duties, they are liable. Code, § 897 (748).

The powers and duties of municipal corporations are legislative or judicial and ministerial. For a failure to perform, or for errors of judgment committed in performing, their legislative or judicial powers the corporation is not liable. They are deemed to be a part

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of the State's power, and, therefore, under the same immunity. For neglect to perform ministerial duties, or for negligent, improper or unskillful performance thereof, the corporation is liable. *Collins v. Mayor, etc.*, 69/542.

473. When the corporation has immunity in the exercise of its powers.

A distinction exists between the public and private powers of a municipal corporation. Its public powers concern the general public and embrace the public peace, the public health, and the like. They are governmental in character and in exercising them the municipality acts as a governing agency for the public or general benefit. Its private powers relate to the particular municipality. They embrace waterworks, sewers, markets and like matters, from which the municipality derives some special or immediate advantage.

When the State delegates portions of its sovereignty to a municipal corporation by granting to it governmental powers of the State, the municipality is, to that extent, to be treated as if it were a department of State. In the absence of legislation to the contrary, it has the immunity of the State, and is not responsible to an individual for the consequences of exercising, or failing to exercise, such governmental powers. It is upon this principle that § 893 (744) and § 897 (748) of the Code rest, when they declare that a municipal corporation is not liable for the torts of a policeman or other officers engaged in discharge of the duties imposed on them by law. Nor are they liable for failure to perform or for errors in performing their legislative or judicial powers. The principle is illustrated by the following cases.

474. Duties pertaining to the health department.

In *Love v. City*, 95/129, plaintiff alleged that while he was passing along the streets an animal attached to one of the garbage-carts of defendant was permitted, by the negligence of a servant, to run away and cause injury to the plaintiff. It was held that the duty of keeping the streets clear of putrid and other substance offensive to the sense of smell, and which tends to imperil the public health, devolves, under the charter of the city of Atlanta, upon the board of health of that city; and, the functions of this department of the city government being governmental, and not purely administrative, in their character, it follows that if, in the exercise of such func-

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tions, and in the discharge of the duties devolving upon this department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city. Atkinson, J., said: "In the discharge of such duties as pertain to the health department of the State, the State is acting strictly in the discharge of one of the functions of government. If the State delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it, within its limits, the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the State, and in the exercise of such powers is entitled to the same immunity against suit as the State itself enjoys. Such a duty would stand upon the same footing as its duty to preserve the public peace, and its liability or non-liability would depend upon the same principle which relieves the city from liability for the misfeasance of a police officer in the discharge of his duty. It will be observed, however, that, in order to exempt a city from liability, it is not sufficient to show that the particular work from the negligent performance of which by the servants of the city a citizen was injured was being performed under the direction of the health authorities, but it must be shown that the particular work so being done was connected with, or had reference to, the preservation of the public health. If the health department were engaged in clearing away or removing obstructions from the street which in no way endangered the public health, the responsibility of the city then would rest upon the rule of liability for the work connected with repairing and keeping in order the public highways. It can make no difference in principle as to the character of the agents employed in the discharge of this duty with respect to the public health. The principle of non-liability rests upon the broad ground that in the discharge of its purely governmental functions, a corporate body to which has been delegated a portion of the sovereign power, is not liable for torts committed in the discharge of such duties and in the execution of such powers. Cited, 97/653; 98/626; 105/314; 111/363, 477.

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So it has been held that a municipal corporation, while enforcing a valid ordinance requiring citizens and residents of the city to submit to vaccination, is exercising a governmental power, and is therefore not liable to a citizen who may sustain damage on account of impure vaccine matter administered to him by one of the officers or agents of such corporation. *Wyatt v. City of Rome*, 105/312.

475. Illegal arrest by officers.

In *Cook v. Mayor, etc.*, 54/468, it was held that, "A municipal corporation is not liable to an action for damages for the illegal arrest of a citizen by one of the police officers of the city. For such arrest the officer is himself liable." *McCay, J.*, said: "The authorities place this kind of a servant on special grounds. He is a peace-officer; his duties do not lie in the line of the special private duties or rights of the corporation, but they are duties connected with the public peace in which the State is interested, and in a very wide sense he is a State officer; many of his duties are connected with the prevention and punishment of crime." Cited, 62/290; 65/389; 68/741; 88/455; 111/368.

476. Assault and battery by quasi-policeman.

In *McElroy v. City Council of Albany*, 65/387, the case stood on demurrer to a declaration which alleged that a city watchman quasi a policeman of defendant, willfully and maliciously, while drunk, threw the plaintiff down and broke his leg. It was held that a municipal corporation is not liable for the torts of its police officers; especially is this the case when the tort was not done in connection with his official duties. That a municipal corporation is not liable for the torts of its police officers was settled in *Cook's case*, *supra*, though the policeman was then engaged in making an arrest, and therefore was within the scope of his agency. Cited, 68/741; 88/455; 111/368.

477. Injuries to convicts.

In *Doster v. City of Atlanta*, 72/233, the plaintiff alleged that when he was placed on the public works as a convict, his fellow convicts, in order to initiate him, strapped him, in the presence of the guards, with a strap belonging to one of the guards. On demurrer to the declaration the action was dismissed, and it was held that a municipal corporation is not responsible for a tort committed

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by one convict, sentenced to work on the public works under its municipal ordinances, upon the person of another, nor for a tort committed upon him by the guard over such convicts.

In *Wilson v. Mayor, etc.*, 88/455, it was held that a municipal corporation is not liable for personal injuries sustained by one prisoner at the hands of another confined in the same cell or room of the city prison, notwithstanding the police officer who arrested the plaintiff, and put him in prison, may have been guilty of wrong or negligence in confining him with an intoxicated fellow prisoner, who was on that account violent and dangerous. Cited, 97/653.

In erecting and maintaining a city prison a municipal corporation is exercising a purely governmental function, and is, therefore, not liable in damages to a person arrested and imprisoned therein by its police officers, for injuries sustained by him, while so confined, by reason of the improper construction or negligent maintenance of such prison. A municipal corporation is not liable for the illegal arrest of a person by its police officers, nor for his consequent imprisonment. Fish, J., said: "The general rule is well established that a municipal corporation is not liable in damages for injuries sustained by reason of the negligent or improper exercise of a purely governmental power. The preservation of the public peace, quiet, good order, etc., of a community, is a governmental function. Where the legislative authority of a city passes ordinances for such purposes, it is clearly exercising a governmental power. When, for the purpose of enforcing such ordinances, the city erects and maintains a prison wherein to confine offenders, for the purpose of punishment, or those charged with offenses, for safekeeping until they can be tried, it is exercising the same power. The enactment of such ordinances, and the provisions made for their enforcement, belong to the police power, which is purely governmental in character." *Gray v. Griffin*, 111/361.

Nor is a municipal corporation liable in damages for the death of one convicted in a corporation court, and sentenced to work upon the public streets, although his death was occasioned while the convict was engaged in such work, and resulted from negligence on the part of the foreman who had been placed by the municipal authorities in charge thereof, and from the failure of such foreman to provide the convict, after his injury, with the proper medical attention and treatment. Lumpkin, J., said: "The question involved in this case had been too often passed upon by

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this court to require further elaboration. Neither the law of master and servant, nor the doctrine of respondeat superior, applies in a case where a prisoner undergoing punishment for a violation of a municipal ordinance is injured or killed in consequence of the negligence or misconduct of the officer having the custody or control of such prisoner. This is true because in such matters the municipal corporation is exercising governmental powers and discharging governmental duties, in the course of which it, of necessity, employs the services of the officer in question." *Nisbet v. City of Atlanta*, 97/650. Cited, 111/364.

478. Legislative and judicial powers.

A municipal corporation is not liable for damages resulting from a failure on the part of its council to perform, or an improper performance of, those powers and duties which are legislative or judicial in their character. For damages resulting from neglecting to perform, or negligence in the performance of, those duties which are purely ministerial, it would be liable. There is no sound distinction as to such liability between a failure to pass an ordinance in the first instance and its repeal or suspension after being passed. Therefore when a city council passed an ordinance forbidding the running at large of cattle in its streets, but subsequently suspended its operation indefinitely, on the ground, among others, that the growth of grass and weeds was too luxuriant for comfort, health and good appearance, one who was gored by a cow running at large in the streets would not have a cause of action against the city. Crawford, J., said: "The powers and duties of the city council under its charter consists in acts which are legislative or judicial in their nature, and those which are purely ministerial. For a failure to perform the first, or for errors in judgment committed in their performance, the corporation is not responsible, because they are deemed to be but the exercise of a part of the State's powers, and therefore under the same immunity. The rule, however, for the last is different, as damages may be recovered either from the neglect to perform them, or from performing them in an unskillful, negligent, or improper manner." *Rivers v. City Council of Augusta*, 65/376. Cited, 66/309; 72/420; 73/746; 110/92.

A municipal corporation is not liable for personal injuries resulting from an error in a plan, adopted in pursuance of its legislative

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power, for the grading and constructing of its sidewalks. By the act of 1892, the city engineer of Augusta has full authority to determine, as a legislative or judicial act, upon the grade and plan of construction of the sidewalks of the city. Where in a suit against the city for injuries no fault is shown except that the plan and grade adopted by the city engineer was an erroneous one, and the evidence as to that is in conflict, a verdict finding the city liable is contrary to law. *City Council of Augusta v. Little*, 115/124.

The operation of a system of water-works is not such a governmental function as that a city is not liable for injuries resulting through negligence in the maintenance thereof. While this business is quasi-public, it is not essentially governmental. *Huey v. Atlanta*, 8 G. A. 597.

479. Municipal functions performed beyond the limits of the State or corporate limits.

In *City Council v. Hudson*, 88/599, it was held that the city council of Augusta, being a corporation chartered by the State of Georgia, has no municipal functions to perform in the State of South Carolina. As the owner and keeper of a toll-bridge over the Savannah River, it is liable for negligence in failing to keep the abutment resting upon the South Carolina shore in safe condition for use by customers, its ownership and use of the bridge extending throughout the whole length thereof, including such abutment. This liability holds, though it may be the law of South Carolina that a municipal corporation of that State would not be liable for such negligence, touching a similar bridge owned by it. Lumpkin, J., said: "The city council of Augusta certainly has no municipal or governmental functions to perform beyond the limits of this State. So far as keeping and maintaining this bridge for gain is concerned, this corporation entered the State of South Carolina to engage in a private business and enjoy the profits thereof. Consequently it must perform the duties and assume the burdens incident to carrying on this business. Whatever immunity, if any, from liability to action of this sort, it may have possessed at home, as a part of the government, the same was lost when it divested itself of the attributes of sovereignty by undertaking such a business in another State. The doctrine here asserted is well supported by authority. See Dill. Mun. Corp. §§ 966, 980-983, and cases cited; *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat.

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904; *Briscoe v. Bank*, 11 Pet. 257; *W. & A. R. R. Co. v. Taylor*, 6 Heisk. 408, 414." Same case, 94/136. Cited, 126/701.

A municipal corporation which is invested with power to construct a system of waterworks for the benefit of the city beyond its corporate limits, to accomplish which it has been specifically authorized to lay mains and pipes under and across public highways, is liable to one injured by the negligent execution of the power granted. Such liability attaches not only as to the laying of pipes, but to the negligent removal of them as well. The act which it is alleged was so negligently done as to injure the plaintiff was not *ultra vires*. *City Council of Augusta v. Macky*, 113/64.

480. Must use its own property so as not to hurt others.

Cullens and Wife v. Mayor, etc., of Savannah, 38/334, was brought to recover damages for an injury caused by the wife's falling into a hole or inequality in the pavement of the public market. It was held that it was the duty of the corporation to keep the pavement in front of the stalls in good condition, and *McCay, J.*, said: "The market was the property of the corporation, from which it derived a revenue, in the way of rents. Why was it not just as much bound to keep that safe as the merchant is the floor of his store? To keep the market in a safe condition, it being property, and used by the city for its revenues, was a private duty. It was the duty of a property-holder, and the city stands, in this respect, upon the same footing as an individual. It must use its own so as not to hurt its neighbors. Whatever was the condition of the street, it was its duty not to have a trap on its private property, by which a citizen was injured. The market stood on a different footing from the streets." Cited, 73/99.

In *City Council of Augusta v. Owens*, 111/464, it appeared that the city owned and operated a quarry, from which it obtained rock, to be used by it in improving its streets. The plaintiff was engaged as a laborer in getting out the rock and was injured. It was held that the testimony in the present case showing that the operation by defendant of the quarry in question was a ministerial act on its part, and there being no evidence to indicate that the work in which the city was engaged was governmental in its nature, the court did not err in refusing a request of defendant's counsel to charge the jury on this subject. Cited, 113/68.

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481. When liable for injuries.

If a municipal corporation has not been negligent in constructing or repairing the same, it is not liable for injuries resulting from defects in its streets, when it has no notice thereof, unless such defect has existed for a sufficient length of time for notice to be inferred. Code, § 898 (749).

A municipal corporation can not be held liable for damages occurring by reason of a defect in its streets, sidewalks, sewers or bridges, when it has no notice thereof, or when such defect has not existed for sufficient length of time from which notice can be inferred, provided the corporation has been guilty of no negligence in constructing or repairing the same. *Mayor v. Wilson*, 82/206.

482. The general rule of diligence as to the condition of the streets.

The general rule is, that a municipal corporation is bound to keep its streets and sidewalks in a safe condition for travel in the ordinary modes, by night, as well as by day, and if it fail to do so, it is liable for damages for injuries sustained in consequence of such failure. *Mayor v. Perdue*, 53/607. Cited, 55/18; 58/239; 66/309; 78/295; 113/156; 123/823; 1 G. A. 415. The rule as thus stated is repeated in *Mayor v. Cooley*, 55/18; *Mayor v. Dodd*, 58/238; *City Council of Augusta v. Tharpe*, 113/156.

In *Bellamy v. City of Atlanta*, 75/167, it is stated thus: It is the duty of a city to keep its streets and sidewalks in a reasonably safe condition, so that a person can pass thereon in safety by day or night; and for neglect to do so it will be liable for injuries caused thereby.

In *City of Atlanta v. Buchanan*, 76/585, it is held that a city is bound to keep its streets, sidewalks and bridges in a reasonably safe condition. Keeping, as so used, includes the proper construction or reconstruction of a bridge forming part of the street. Cited, 2 G. A. 587, 378.

It is the duty of a municipal corporation to keep its streets and sidewalks in a reasonably safe condition so that persons can pass along them in the ordinary methods of travel in safety. *Idlett v. City of Atlanta*, 123/821. Cited, 125/61; 2 G. A. 378.

A municipal corporation is bound to keep its streets and bridges

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in a reasonably safe condition for travel; and there is no error in so charging the jury. *City of Cedartown v. Brooks*, 2 G. A. 583.

Municipal corporations are required to keep their streets and sidewalks in safe condition for travel in the ordinary modes by day and by night; and are responsible if they fail to exercise ordinary and reasonable care and diligence for the accomplishment of this end. Powell, J., said: "Whether they have exercised that care and diligence is a question of fact to be determined by the circumstances of each case. In determining this question regard must be had as to whether the street is newly opened or has been in existence for some time, whether the municipality is small and poor or populous and wealthy, whether the street is a frequented thoroughfare or a remote passageway; after viewing these and all other legitimate considerations the jury must determine whether, in the light of all the circumstances, the municipality has used reasonable diligence to make the highway safe. *Idlett, Tharpe, supra*; *Elliott on Roads and Streets*, § 613." A municipal corporation is under no duty to erect barriers or to maintain lights to prevent injury to persons seeking to enter a street from private land at point at which there is no traveled way either public or private, and at which there is nothing to put the municipality on notice that an entrance is likely to be attempted. *Ivester v. City of Atlanta*, 115/853. Cited, 122/855.

The declaration in *Wilson v. City of Atlanta*, 59/545, alleged that he, with his three children, was riding along Harris street when one of his horses became frightened at the whistle of an engine thereby and sprang so suddenly forward as to break the singletree. This increased the fright of the horses and they ran away, without fault on his part. Harris street was some fifty or sixty feet wide; along the center of it defendant had built an embankment or grade about ten feet high and two hundred yards long. This was thirty-five feet wide, thus leaving a part of the street sunk below its level. It was the duty of the city to have placed a railing along the edges of the embankment, to protect passers. As plaintiff's horses ran, the buggy was pulled to the side of the embankment and thrown over, injuring him seriously. The accident resulted from the defendant's building such an embankment and then leaving it improperly exposed. On demurrer to the declaration it was held that though the plaintiff's horses took fright, turned over his buggy, and threw it down the embankment of the street, and thus he was in-

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jured, yet if the city was negligent in constructing the embankment, in not providing it with necessary railing or other means of protection, and in not keeping the streets in safe condition, and such negligence was the real cause of the injury (the jury being the judges of these matters as questions of fact), the plaintiff has a cause of action. When the case was again before the court, 60/473, the following principles were announced: The streets of a city should be graded so as to be reasonably safe for travel thereon; and whether so or not must be determined by each locality—the nature of the ground thereat and its surroundings—and not upon any general plan adopted by the city, even if the record showed evidence of such a plan. If the city authorities have power or jurisdiction to erect embankments in the streets, it follows that they have power to make such embankments safe by side-railings or other suitable barriers; but whether such railings were reasonably necessary for safety and the city was guilty of negligence in not constructing them, and whether they actually caused the injury, may well be elucidated by the inquiry whether the plaintiff would not have been hurt even if they had been constructed, and that therefore he must show that such barriers would probably have prevented his hurt. Even in case of accident and the running away of horses with a buggy and injury to plaintiff's person, there may be a recovery, if, nevertheless, the negligence of defendant was the real cause thereof, in that the street was not safe for travel; and the real questions in the case are, first, was this street, considering the width of the embankment, the height thereof, the slope of descent to the portion not elevated, the condition thereof for smoothness and ease of carriage, reasonably safe for travel, and secondly, if it was not, was the damage to plaintiff really caused by its unsafe condition, or by the running away of the plaintiff's horses, unaffected by the defendant's negligence. Cited, 68/834.

In order to bind a municipal corporation for the care of a strip of land offered by an abutting owner as a sidewalk, acceptance by the proper city authorities must be shown. The acceptance may be express or implied. If express, it can be shown only by the minutes of the official tribunal; if implied, it may be shown by proof that the sidewalk was worked and used under authority of the council, or other body having such matters in charge. Testimony that work was done upon the sidewalk by the street hands of the municipality, or by its engineer, or under the directions of its street committee,

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is admissible for the purpose of raising the inference that the work was done by the authority of the municipal body. *Mayor & Council of Americus v. Johnson*, 2 G. A. 378.

483. Negligence the test of liability.

In an action against a municipal corporation to recover damages for a physical injury, negligence on the part of the defendant is the test of liability. No matter how free from negligence the plaintiff may have been he would not be entitled to recover unless his injuries were caused by or were attributable to negligence on the part of the defendant. And there being no presumption of negligence against the defendant, it is incumbent on the plaintiff to prove negligence on its part. *City of Columbus v. Ogletree*, 96/177. Cited, 114/197; 115/368; 116/648; 117/145. It is only negligence in itself, through it officers and agents, that makes the city liable. *Enright v. City of Atlanta*, 78/289. Cited, 116/651.

No presumption of negligence arises against a municipal corporation upon proof of an injury caused by a defect in its streets, but negligence must be proved as charged in the petition. It was therefore error, in an action for damages against a city, for the court to charge that "when the plaintiffs show that they were damaged by reason of a defect in the streets, then it is incumbent upon the city to show that it exercised all proper care required by law for it to exercise." *City of Atlanta v. Stewart & Ray*, 117/144.

The undisputed evidence being to the effect that the sewer in which the plaintiff's minor son was alleged to have been drowned was properly constructed and was necessary to prevent the streets and private property from being damaged by overflow from heavy rains, and there being no evidence of any negligence on the part of the city or its employees, the verdict against the city was contrary to law and the evidence. A properly constructed drain four feet wide and two feet deep, made for the purpose of carrying off surface-water, is not such a contrivance as would be so inviting to a child nine years old that the city would be liable for his death by drowning, due to his playing in the drain during or just after a very heavy rain. *City of Rome v. Cheney*, 114/194.

A petition in a suit for damages against a municipal corporation on account of personal injuries, which alleges that the municipal authorities allowed to be placed at a certain point in the city "two large stones," and that the plaintiff's horse became frightened at

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these stones and ran away, causing the injuries on account of which suit is brought, but which fails to allege the length of time that the stones were permitted to remain in the place described, that the stones were objects naturally tending to frighten an ordinarily road-worthy horse, and that his horse was such an animal, and which does not allege that the city violated any duty in failing to cause the removal of the stones, or make any allegation of fact from which such a violation of duty can be inferred, does not state facts sufficient to authorize a recovery against the city, and should be dismissed on demurrer. *City of Rome v. Suddeth*, 116/648.

484. Ordinary diligence required as to both parties.

In *Wilson v. City of Atlanta*, 63/291, it was held that ordinary diligence on the part of a person driving upon a street, and ordinary diligence on the part of the city in constructing and repairing the street, do not imply a like degree of vigilance in foreseeing danger and guarding against it. And on this point, Bleckley, J., said: "While, in respect to its streets, a city and a passenger upon them are alike bound to ordinary diligence, yet the diligence of the former has relation to keeping the streets in safe condition and repair, and that of the latter has relation to walking, riding or driving along them in proper manner and with due caution. Ordinary diligence on the part of the city is that due care which every prudent municipality takes to put its streets in safe order and keep them so; on the part of the passenger, of average powers and capacity, it is that care which every prudent person takes to pass over them without sustaining injury or inflicting any. The duty of maintaining a street in a condition fit for safe use, though limited to ordinary diligence in those on whom that duty is cast, involves a very different measure of diligence in foreseeing danger, from that which a passenger is bound to exercise. It follows that a passenger may know the street or the locality, and yet be free from negligence, while the city, on the same state of facts, might be chargeable with negligence, even with gross negligence. In no respect is the vigilance obligatory upon the one a measure of that which is obligatory upon the other. Each is bound to the diligence appropriate, not to a common duty, but to a separate and distinct duty appertaining to a separate and distinct class. If the passenger has special knowledge which ought to heighten his care above that which would be usual and reasonable in those less informed, his conduct should conform to that of or-

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dinary prudent men possessed of like information and placed in like circumstances. Ordinary diligence involves a reasonable use of all the resources, mental and physical, which are at the passenger's command." Cited, 123/823.

Ordinary diligence on the part of a person passing along a sidewalk of a public street of a municipal corporation, and ordinary diligence on the part of the corporation in constructing and repairing the sidewalk, do not imply a like degree of vigilance in foreseeing danger and guarding against it. *Idlett*, 123/821. Cited, 128/471.

Relatively to the city it was not error for the judge to charge the jury that if the plaintiff (a child of twelve years) was a passenger upon the street, and was injured by an obstruction on the street while playing thereon, and such playing was simply incidental, it would be no bar to his recovery if the city was negligent. *City Council of Augusta v. Tharpe*, 113/152. Cited, 123/823; 124/1052; 125/61; 1 G. A. 415; 2 G. A. 379.

A traveler using a street or sidewalk is required to use ordinary care to avoid being injured by any defect therein or obstruction thereon. What amount of lookout for defects or obstructions he must observe in order to meet this requirement is a question of fact for the jury, to be determined by the circumstances of each case. *Mayor & Council of Americus v. Johnson*, 2 G. A. 378.

Pedestrians have the right to use the entire highway, and are not confined to the sidewalks alone. If a pedestrian leaves the sidewalk and enters upon the portion of the highway devoted primarily to vehicles, the surroundings may require of him the exercise of a greater amount of care and caution for his own protection than if he had remained upon the sidewalk; but the question of his negligence under the circumstances is one for the jury. *William Bensel Construction Co. v. Homer*, 2 G. A. 369.

485. If plaintiff fails to shun consequences of defendant's negligence.

If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. Code, § 4426 (3830).

In *Wilson v. City of Atlanta*, 63/291, it is said that negligence by the defendant, the consequences of which the plaintiff could shun by the use of ordinary diligence, goes for nothing.

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The allegations of the declaration in this case did not show that the plaintiff could have avoided the injury to herself by the use of ordinary care, and that she failed to exercise such care, so as to authorize a dismissal of the case on demurrer. *Idlett*, 123/821.

In an action against a municipal corporation for personal injuries resulting from the falling of a shed over a sidewalk, it is not error to refuse to charge that the plaintiff can not recover if she was guilty of any contributory negligence. *City of Columbus v. Anglin*, 120/78.

486. Illustrations of the principle.

Although it was gross negligence for the municipal authorities of a city, after causing a ditch five feet wide and three or four feet deep to be cut across a public sidewalk, to leave it open, in this condition, for several weeks, a female who was perfectly aware of the existence, width, and depth, of the ditch, and who either attempted to jump across it, or stepped into the bottom of it on a rock, and tried to step out, and was thus injured, has no right of action against the city. It is clear that, by the exercise of ordinary care on her part, the injury might have been avoided. *Sheats v. City of Rome*, 92/535. *Dis.*, 120/982. *Cited*, 133/528; 2 G. A. 564.

It is so apparent, from the testimony of the plaintiff, that her injury could have been prevented by the exercise of ordinary care on her part, that the grant of a nonsuit was not error. The plaintiff's full knowledge of the nature and condition of the footbridge only increased the obligation upon her part to observe due caution. The case is controlled by the ruling in *Rowe*, 2 G. A. 558 (3, 4), 563 (59 S. E. 462). *Browning v. Village of Cave Spring*, 7 G. A. 724.

One who knowingly and voluntarily takes a risk of injury to his person and property, the danger of which is so obvious that the act of taking such risk, in and of itself, amounts to a failure to exercise ordinary care and diligence for his own safety and that of his property, can not hold another liable for damages from injuries thus occasioned. *Hogan*, 131/157; *City of Columbus v. Griggs*, 113/597. *Cited*, 123/237; 131/159. *Dis.*, 123/824; 124/1052.

Where, with full knowledge of the existence of a ditch in a highway, and without any emergency requiring it to be crossed, one endeavors to pass over the excavation, he will be treated as having voluntarily assumed all of the usual risks incident to the attempt.

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In such a case he can not recover for damages occasioned by stepping or stumbling into the excavation, slipping from the wet or loose dirt on the bank to the bottom of the trench, or, by reason of inability or miscalculation, failing safely to step to the opposite side. But while a pedestrian is charged with the assumption of the ordinary risks of attempting to pass such an excavation, he does not assume the danger occasioned by latent and unknown defects, such as those caused by an undermining, whereby the bank caved when the crossing was attempted. The petition alleged, that the ditch was three feet wide at the top and six feet wide at the bottom, that this defect was known to the defendant and unknown to the plaintiff, who could not have discovered the same by the exercise of ordinary care, and that the bank caved in as she attempted to step across the excavation, causing serious personal injuries. The petition set out a cause of action. *Kent v. Southern Bell Telephone Co.*, 120/980. Cited, 2 G. A. 564.

In *Rowe*, 2 G. A. 557, it was held that where with apparent full knowledge of the existence of a ditch in a public road, and without any emergency requiring it to be crossed, one endeavors to pass such an excavation, he will be treated as having voluntarily assumed all the usual risks incident to the attempt. Where it is clear from the allegations of the petition that the plaintiff's injuries might have been avoided by the exercise of ordinary care on his part, a proper demurrer to the petition should not be overruled. Russell, J., said: "In *Kent v. So. Bell Tel. Co.*, *supra*, where the greater portion of the danger was concealed by the peculiar manner in which the ditch was cut and was not apparent to the plaintiff, the Supreme Court held that the petition set forth a cause of action, because these allegations took it out of the rule declared in *Sheats v. Rome*, *supra*, and *Cook v. Atlanta*, *supra*, but reaffirmed the doctrine of those cases by saying that the plaintiff could not recover if 'she knew what was before her; with full knowledge she assumed the risk, and could not put the injurious consequences upon another, even though that other had been at fault in creating the condition out of which her damage arose. But the petition does not make such a case.'" Cited, 3 G. A. 410; 7 G. A. 724.

In *Cooke v. City of Atlanta*, 94/613, it appeared that a licensed plumber had cut a ditch entirely across the south side of Wheat street, to within about twelve inches of the street-railroad track, which was in the center of the street, and from a point about twelve

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inches from the track on the north side thereof to within about eight or nine feet from the sidewalk on the north side of Wheat street. That part of the street upon which the railroad was located, and for a distance of twelve inches on both sides of the same, was not excavated, but was tunneled under, the surface being left undisturbed. The ditch was about two feet wide at the top next to the car-track, and wider near the north side of the street, and was from eight to ten feet deep. The street, at the point in question, was one of the public streets of the city. The way left clear in the center of the street was about two feet wider than the carriage-track. There were no barriers or guards around the excavation; nothing to put one on notice of danger, except the excavations themselves, and the piles of dirt and stone on each side of the excavations. On the day after the ditch was cut, plaintiff's servant was driving two horses hitched to a carriage, and when he reached this place, he stopped the horses, raised himself up, looked forward for a few moments, and then started his horses in a slow walk along the railroad-track, the carriage-wheels being inside of the rails. He seemed to have the horses under control, and was driving cautiously. One of the horses shied and threw himself and the other horse into the ditch. If there had been guards or barriers strong enough around the excavation, the horses could not have fallen in. The driver could have gone to his destination by other streets without much loss of time. It was held that it is manifest that, by the exercise of ordinary care on the part of the servant of the plaintiffs, the consequences of the alleged negligence of the defendant could have been avoided. This plainly appears from the evidence relied upon for a recovery. There was no error in granting a nonsuit. Cited, 2 G. A. 564.

In *Massey v. Mayor, etc., of Columbus*, 75/658, it was held that a city is bound to keep its streets in a reasonably safe condition for persons to pass thereon by night as well as by day; but if a person could have avoided injury from the existence of an open sewer in the middle of a street by the use of ordinary diligence, the city would not be liable therefor. It appeared in this case that the system of drainage in Columbus is by open drains in the street running north and south. There were crossings where the streets running east and west intersected those running north and south. The street on which the plaintiff was hurt had in it a drain that had been there twenty or thirty years. There were nearly fifty feet of clear street

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on each side of the drain. The drain or sewer was five or six feet wide, and eight or ten inches deep. Plaintiff at night, when it was dark, left the track, which was safe and in good order, and drove into the sewer and was injured. If he had continued on the street to the intersection of the street running east and west no damage or accident would have occurred. He lived near the city of Columbus, and testified that he knew there was a low place in the center of the street by which it was drained, but when he passed that place two days before there was no ditch there. Cited, 108/273.

In *Mayor, etc., of Rome v. Dodd*, 58/238, the plaintiff was injured by falling through a hole in a bridge across a ditch in one of the defendant's streets, and it was held that though the plaintiff might, in some way, have contributed to the injury sustained by him, yet that would not prevent his recovery if, by ordinary care, he could not have avoided the consequences to himself of the defendant's negligence. Cited, 73/99; 113/564.

If a city was negligent in not repairing a hole in one of its sidewalks, and a passenger was injured by falling into it, it is not sufficient to prevent his recovery that he may have been lacking in ordinary care and diligence to avoid the injury; but it must appear that by the use of such ordinary care and diligence he could have avoided the injury. *Enright v. City of Atlanta*, 78/288.

In *Samples v. City of Atlanta*, 95/110, it was ruled that although a traveler may know that because of the defective construction of a public bridge in a city there is some danger in driving over it, still he may recover from the city for injuries sustained in so doing if it clearly appears that the danger was not obviously of such character that driving over the bridge would necessarily amount to a want of ordinary and reasonable care and diligence, and if it also appears that in driving over the bridge the plaintiff did in fact observe such care and diligence. In such case the mere fact of driving over the bridge would not of itself authorize a finding that the plaintiff by so doing consented to the injuries thereby occasioned. Consequently it was error to charge as follows: "If you believe from the evidence that the plaintiff was acquainted with the bridge, and knew of the danger of driving over it, and nevertheless did so, you should find that he consented to the injury, and therefore that he can not recover; for it is a principle of law that no man can recover damages from another where he consented to his injuries." *Lumpkin, J.*, said: "If the danger arising from a defect in a bridge or other

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portion of the highway within the limits of a city is obviously of such character that no person, in the exercise of ordinary prudence, would attempt to pass over the same, or, in other words, if such an attempt would, of itself, plainly and unequivocally amount to a want of ordinary care and diligence, the court may so instruct the jury as matter of law. But in other cases the mere knowledge of the existing defect will not prevent a recovery on the part of one who is injured because of the defect, if the use of the bridge or highway in which the defect exists is consistent with ordinary care, and it further appears that the plaintiff did in fact exercise such care. All cases of this kind should be submitted to the jury, who in determining what would be ordinary care in the particular instance should take into consideration and carefully weigh all the facts and circumstances; and nothing short of the care which a person of ordinary prudence would exercise with reference to the existing conditions should be held sufficient on the part of the plaintiff." Cited, 107/352; 108/273; 113/597; 123/237, 824; 125/805; 128/471; 1 G. A. 416.

In *Dempsey v. City of Rome*, 94/420, it was held that the evidence showing that the plaintiff was injured at night by getting his foot fast in a hole which had existed for two weeks or longer in a plank crossing upon one of the most frequented streets of the city, the plaintiff at the time using the crossing, as one of the public, for a footway in passing over it, the case was one for submission to the jury on the question of negligence by the city authorities in having and leaving the crossing in that condition. The evidence further showing that the hole extended longitudinally along the crossing, and was about ten or fifteen inches long, three inches wide, and two or three inches deep, and that the plaintiff had observed it a week or two before he was injured, and that at the time he stepped into it he "had his hands in his pants pockets, was walking very peart, and wan't paying any attention," it was a question for the jury whether, under these circumstances, he was negligent in 'not thinking of the defect in the crossing, looking out for it, and taking care for his own safety. It was error to grant a nonsuit. Cited, 95/119; 113/157; 123/823; 124/1053.

In *Hendley v. Mayor, etc.*, 101/140, it appeared that the plaintiff, with her husband, was sitting in a chair in a wagon drawn by a mule, and when they came to the bridge which crossed a small stream or branch running through a public street in the city the

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mule shied at a hole in the plank of the bridge next to the ground as they approached, whirled around, and tilted the wagon so that plaintiff was thrown out and injured in the manner described. Neither plaintiff nor her husband saw the hole until the mule shied. It was usually a gentle animal. She had driven it many times. She testified that the hole "was right along where we travel over. It was not at the end; it was in the bridge—in the track where they travel over. The mule got on the bridge right up to the hole." Her husband testified that the mule became scared at the hole and a rock which had been set in it. The rock weighed forty or fifty pounds, but did not completely stop up the hole, which was about twelve to sixteen or eighteen inches wide. The bridge was from five to seven feet in width, and ten or twelve feet long. The hole was about the center of the wagon-tracks, about where the mule would walk. After the accident, they crossed over with the wagon. From other testimony it appeared that the hole had been made by the plank having become rotten where the wheels of vehicles would strike the bridge. It had been noticed by one witness a week previously, and by another two or three weeks before. It was about a foot and a half long, and exposed the water in the stream. The rock had been placed in it by one of the witnesses to give people notice, this being three or four days before the accident. The place had been repaired since that time. There was plenty of room on the bridge for the animal to have walked around the hole, but the wheel of the wagon would have gone into the hole, etc. One witness testified that the hole was not in the plank of the bridge, but was where the plank had sloughed off. It was held that the evidence made a *prima facie* case for the plaintiff, and it was error to grant a nonsuit.

In *Skinner v. Town of Douglasville*, 108/766, it was ruled that it was, on the trial of an action against a municipal corporation for personal injuries alleged to have been occasioned by a defect in a street, erroneous to direct a verdict for the defendant, when there was evidence from which the jury might have found that it was negligent, and that at the time of receiving the injuries the plaintiff was exercising ordinary care and diligence.

In the case *Baker v. City of Rome*, 107/347, Cobb, J., said: "The city of Rome was engaged in a series of street improvements, in the course of which the sidewalk at the corner of two intersecting streets was elevated from three and one-half to four feet above the street. At this corner, while the work was still in progress, some

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one had placed a plank, apparently sound, twelve inches wide, and from sixteen to twenty feet long. One end of the plank rested on the top of the wall of the sidewalk and the other end extended into the street. In order to get upon the crossing leading out from the corner in the direction in which the plank extended, pedestrians had either to walk down this plank or get down from the sidewalk into the street before reaching the corner and go around the plank, which could be done with little inconvenience and with perfect safety. There was, however, a well-beaten path leading up to the plank, and while some few pedestrians used the street as the means of reaching the crossing, the great majority of them walked to the corner on the sidewalk and used the plank, which remained in place two or three weeks. There was "a nick" on one corner of the end of the plank resting on the street, which caused this corner to be elevated a little above the street. This defect was not patent to a casual observer, and made the plank liable to rock when used. With this exception the plank was perfectly sound. Plaintiff, who was a man about forty years of age, and who used a stick in walking on account of a slight stiffness in one of his legs, attempted to reach the crossing of the street by means of the plank. When he got about one-third of the way down the plank it rocked with him and threw him off, and he thereby sustained severe injuries. The city authorities have a right to lay out sidewalks, and when so laid out it is their duty to see that they are kept in a reasonably safe condition for travel. But in laying out a sidewalk and in declaring what is a sidewalk they are not given the arbitrary power to say that any contrivance which suits their whim or caprice is a sidewalk. If the contrivance declared to be a sidewalk is so manifestly unsuited for such use that it would be obvious to any person of ordinary prudence that its use as such would be attended with some degree of risk and danger, then such a contrivance would not be a sidewalk within the meaning of the law which renders a city liable for failure to keep its sidewalks in a condition reasonably safe for travel. A plank twelve inches wide and sixteen to twenty feet long, loosely resting at one end upon the wall of a sidewalk three and one-half to four feet high, is so manifestly unsuitable for use as a sidewalk in a populous city that it will not be so considered unless it is clear that no other course was open to the city authorities except to adopt such an unusual device. It can be safely held as a matter of law that such a contrivance can never become a

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sidewalk except from extreme necessity. The present case presents no such necessity. The risk attendant upon the use of such a contrivance being so clearly obvious to any person of ordinary intelligence, it will not be presumed that any such person would treat the same as a lawfully constructed sidewalk; nor, in the absence of positive proof that the same was erected by the authority of the city, will it be held that it was intended by the persons in charge of the city government, who are supposed to be men of at least ordinary intelligence, that such a contrivance should be treated by the public as a part of the sidewalk. There being no proof that the city authorities had anything to do with placing the plank at the place where the plaintiff used it, or that it was intended by them to be used by the public, and the evidence showing that the work of improvement was incomplete, and that only while the work was in this incomplete condition was the plank ever used, there would be no presumption arising from the use of the contrivance under such circumstances, no matter how long or how continuous, that the city authorities placed the plank in position to be used. While there was proof that it had been used by pedestrians for two or three weeks, and that it was defective and liable to turn when any one was walking upon it, and that this defect was not patent, the contrivance was of such a nature that any person of fair intelligence was bound to know it could not have been intended by the city authorities to be used as a sidewalk. Any person possessed of ordinary prudence was equally bound to know that its use under any circumstances was attended with some risk and possible danger. Such being true, it is apparent that a person possessing the qualities above referred to who used the same would take whatever risk of injury there might be resulting therefrom. Especially is this true in the case of the plaintiff, who was laboring under a disability in the use of his lower limbs. When he voluntarily chose to take a path which was to a person in his condition manifestly dangerous, when one which was free from danger was easily accessible to him, he was guilty of such negligence as precluded his right to recover damages for the injuries sustained by him in using such an obviously unsafe and unsuitable contrivance. See, in this connection, *Samples v. Atlanta*, *supra*; *Alexander v. Rhodes*, 104/807; *Daniel v. Forsyth*, 106/568; 48 Ill. App. 166; 59 Ill. App. 446."

In a suit against a city for damages resulting from falling into a hole on the sidewalk, it being in issue whether the plaintiff was

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under the influence of liquor at the time of the injury or not, there was no error in admitting evidence of repeated drunkenness for some years before the injury and afterwards, the judge having cautioned the jury that unless the plaintiff was under the effects of liquor on the night of the injury such testimony could not affect his case. *Enright v. City of Atlanta*, 78/288.

In *Zettler v. City of Atlanta*, 66/195, it was held that where one voluntarily leaves a safe, convenient and well-lighted sidewalk, and after proceeding several feet therefrom, falls into an excavation, the municipal corporation is not liable therefor; and on such evidence a nonsuit will be awarded. *Aliter*, if the excavation was so near the sidewalk that from the ordinary accidents of travel one would be liable to fall into it while pursuing the ordinary traveled way. Cited, 75/662; 69/622; 73/162.

487. Negligence in constructing and repairing by the city.

Where a municipal corporation gave express permission to an individual to open a ditch across a street in a city, in order to connect the water-pipes of a private person with the city water-works, this was in effect the opening of the ditch by the city itself; it was the act of the city, and it became liable for any damage which might accrue to any person by reason of the careless and negligent manner in which the work was done. It was the duty of the city to have superintended and overlooked the work which it permitted to be done on its streets, and to have seen that it was done in such manner that no injury should come to passers on the street from defects therein. *Mayor, etc., of Savannah v. Donnelly*, 71/258. Cited, 77/761; 91/716.

In *City Council v. Cone*, 91/714, on a demurrer to the declaration, *Simmons, J.*, said: "The objection of counsel for the plaintiff in error was to the insufficiency, as he contended, of the allegations as to notice to the defendant of the unsafe condition alleged to exist at the time of the injury. Under the decision of this court in the case of *Donnelly, supra*, no notice of such condition was necessary in order to charge the city with liability. The declaration alleges special permission from the city council to do this particular work, and knowledge of its progress on the day in question, and the ordinance requires that a certain officer of the city shall exercise supervision over the work, and see that it is properly done. This being so, the city became liable for any damage which might accrue

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to any person by reason of the careless and negligent manner in which the work was done. *Jones, Mun. Corp.* § 81; 2 *Dill. Mun. Corp.* (4th ed.) §§ 1024, 1027; 132 U. S. 295, 10 Sup. Ct. Rep. 90; 83 Mo. 345; *43 N. Y. 261; 52 N. W. Rep. 833."

In an action against a municipal corporation for damages resulting from the breaking of a plank in a bridge in one of its streets, it appeared that the city, by its agent, its employee, put a sappy plank in a bridge, which broke and caused the injury complained of. It was held that the ground of action is either misfeasance on the part of the corporation, its officers or servants, or of others under its authority, in doing acts which caused the street to be out of repair, or else neglect by the corporation to put the street in repair, or remove obstructions therefrom, or remedy causes of danger occasioned by the wrongful acts of others. In the former case, no further notice to the corporation of the condition of the street is essential to its liability. In the latter case notice of the condition of the street, or what is equivalent to notice, is necessary. *Mayor, etc., of Brunswick v. Braxton*, 70/193. Cited, 4 G. A. 685.

In *City of Atlanta v. Buchanan*, 76/585, it was alleged that the injury occurred by reason of a bridge faulty in its construction, and it was held that if a city constructed a bridge in one of its streets of loose plank, or upon reconstructing it, the planks were left unfastened by its employees, notice to them is notice to the city. The second act of fastening plank upon it and making it safe, is construction, if not of all the bridge, at least of an essential part to safe passage over it.

488. Negligence in failure to repair, or in remedying causes of danger occasioned by others; sidewalks.

In *City of Atlanta v. Milam*, 95/135, it was held that the duty of a city to keep a sidewalk reasonably safe for public use extends to all of the sidewalk intended for travel by the public as a thoroughfare, and is not confined to keeping in a safe condition a special part only of the sidewalk which happens to be most generally used. The jury having, at the request of defendant's counsel, been permitted to personally inspect the obstruction upon the sidewalk which occasioned the injuries received by the plaintiff, and there being evidence to sustain a finding that because of this obstruction the sidewalk was not reasonably safe for the passage of pedestrians, and that the city was negligent in permitting the obstruction to re-

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main, and the charge of the court having fully and fairly guarded all the rights of the defendant, the discretion of the trial judge in refusing to set aside the verdict in the plaintiff's favor will not be overruled. Lumpkin, J., said: "While, of course, in most American cities, water-plugs, telegraph and telephone poles, trees, and other things, are allowed upon the margins of sidewalks, and pedestrians, therefore, are not expected to use such portions of the same as are occupied by these obstructions, still there can be no doubt, under the rules of law now settled by repeated adjudications in this and other jurisdictions, that the city authorities must keep in a reasonably safe condition all parts of its sidewalks which are intended to be used by the public. It may often happen that in a particular locality a comparatively narrow portion of a sidewalk, on either side or in the middle of it, is much more generally used than other portions of the same; but this does not relieve the municipal authorities from liability for negligence in permitting dangerous obstructions to be continuously maintained in places upon sidewalks over which the public have a right to pass, merely because those places are not so much used as others. It appeared in this case that the obstruction over which the plaintiff fell had existed for a considerable time, and was located upon a portion of the sidewalk over which he had a right to walk. The evidence as to the dangerous character of the sidewalk was rather weak—so much so that we would very probably have set aside the verdict in the plaintiff's favor had it not been for the fact that the jury, at the request of the defendant, were permitted to personally inspect the obstruction, and form their own opinion concerning it by ocular demonstration. We are constrained to hold that they were better judges on the subject after this opportunity of obtaining information than we could possibly be from a mere paper report of the testimony introduced in the case. We will therefore allow the verdict to stand."

While the evidence for the plaintiff below is weak, the jury, by consent of both parties, were permitted to personally inspect the premises where the tort was committed, and, under the rule laid down in *City of Atlanta v. Milam*, *supra*, the judgment of the court below should be affirmed. *Mims*, 122/422.

It is apparent from the evidence that the proximate cause of the injury which the plaintiff received was the defective condition of the street, and that the plaintiff in error was negligent in not repairing or protecting the same. *Mayor, etc. v. Wood*, 111/862.

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It is the duty of the authorities of a city to keep and maintain the sidewalks thereof in a reasonably safe condition for public use, and this duty is not performed by keeping in such condition that part of the sidewalk only which is most generally used. Whether a wire stretched along the outer edge of a sidewalk about four feet from the ground, and fastened to two poles, by contact with which the plaintiff was injured, was an obstruction to the safe use of the street, was a question of fact for the jury to determine under proper instructions from the judge. It was not error to refuse to charge the jury that one passing from the street to the sidewalk or the reverse (in a city), at any point other than a crosswalk, has no reason to expect a safe passage-way, and must therefore do so at his own risk. *City Council of Augusta v. Tharpe*, 113/152.

In *Stewart v. City of Rome*, 116/738, the plaintiff alleged that she was injured by a fall occasioned by an improperly constructed iron cylinder used as a water cut-off, which was placed on the sidewalk of one of the streets of the city. She claimed that such cylinder was covered with an iron cap or top, and that this was loose and unsteady; that on the day named, while she was walking on said street, she stepped on the cap or covering of the cylinder; that it turned under her weight and threw her violently to the ground, inflicting permanent injuries, which were fully described; that she was without fault, but was injured in consequence of the negligence of the city in constructing said appliance, and in permitting said fixture to remain on the sidewalk in its then defective condition, projecting as it did above the sidewalk, and being loosely capped, etc. Little, J., said: "It appears from the evidence introduced, that the City of Rome owned and controlled its system of waterworks; that the cylinder had been allowed to remain on the sidewalk projecting above the same for a number of years; and that different persons had fallen by coming in contact with the same. The evidence for the plaintiff was amply sufficient to authorize the jury to find that she was injured; that this injury was occasioned by her stepping on one of two cylinders so placed; and that they projected above the level of the sidewalk, according to the evidence of one of the witnesses, from an inch to two inches. It would seem that the city, being owner and proprietor of the waterworks system and having full control thereof, would be charged with notice of the condition of these cut-offs; and in addition to this, the time which they were shown to have existed on the street in that condi-

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tion would of itself have been sufficient to charge the city with notice." Cited, 125/61.

489. Sidewalks; cellar-doors, water-meter box.

In an action against a municipal corporation for injuries resulting from falling into a cellar-door on one of its sidewalks, left open by the owner of the property on its street, there are two questions for the jury: First, is the system adopted by the defendant in regard to allowing cellars on its sidewalks, reasonably calculated to ensure the safety of those who travel thereon by night or by day? Second, if so, is the defendant liable in the special case by reason of negligence in the owner, coupled with notice, actual or constructive, to the city? *City of Augusta v. Hafers*, 61/49.

The basis of the plaintiff's right to recover is negligence, and whether the system of the defendant in regard to allowing cellars on its sidewalks, in front of business houses, is reasonably calculated to ensure the safety of those who travel on it by day or night, is a question of fact for the jury, and not a question for the court to decide in its charge. In passing upon it, evidence that children, upon different occasions, have previously fallen into such openings, was admissible. It bears remotely upon the question, and is admissible for what it is worth. *City of Augusta v. Hafers*, 59/151. Cited, 113/157.

The case of *Chapman v. Mayor and Council of Macon*, 55/567, was this: An opening was made by folding cellar-doors in a sidewalk. They were used by the occupier of the cellar. They had been there for forty years, and the plaintiff had regularly passed over the sidewalk to and from his meals daily for a long time. A few moments before the accident he had procured some eye-water from a drug-store and had gone to his place of business and applied it to his eyes. The doors were then down. On his return, the eye was smarting and he had his handkerchief over it. The other eye, which was not affected, was kept by him on the outer edge of the sidewalk so as to keep on it, thinking he would thereby be safe. One of the doors was up and open, and stepping on that which was down nearest to him, he made another step upon the opening made by the other door, or half of the door, and fell in and was hurt. It was ruled that, cellar-doors opening out on the sidewalk, and frequently or negligently kept or left open, endanger the use of such sidewalk in the night, and, to persons of imperfect vision,

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by day, and the city is liable to suit by persons falling into the cellars and injured thereby, if it has notice of such negligent use of the cellars. If this were a single act of negligence the city would not be held liable, because it would not be charged with knowledge, nor could notice in fifteen minutes be given to it. If the negligent use has continued a long time notice will be presumed, and the city is chargeable therewith, without actual proof of notice. Whether the use of the doors in opening and leaving them open, has been proper and legitimate for the business of the owner, or capricious and unnecessary, and if legitimate, whether habitually used so negligently as to endanger the passers-by, are questions for the jury; and whether the plaintiff was so negligent himself, in venturing out in his then imperfect sight, as to prevent his recovery on proof of negligence by the use of the occupiers of the cellar and knowledge by the city, is also a question for the jury, and the court should not decide these questions itself by granting a nonsuit. Cited, 59/154; 61/50; 7 G. A. 244.

It is a jury question as to what length of time a defect in a street must exist, to charge a municipality with knowledge of negligence. *Enright v. Atlanta*, 78/289. If a water-meter box upon a sidewalk is kept alternately in a safe and in a dangerous condition for a considerable time,—such a length of time as that if the condition was dangerous all the time, notice of the defect could be presumed,—it would not be necessary for one injured by reason of such alternating danger to show notice or knowledge on the part of the municipality upon each recurrence of the danger; but if the condition of the danger is such that safety and danger exist intermittently, it will be presumed that the recurrence of the danger was to be anticipated. *Chapman v. Macon*, 55/566. Although the plaintiff in this case might have observed the defect in the sidewalk some time before, she might also reasonably have supposed that the municipality had remedied the defect in the water-meter box; and it was a question for the jury to determine, under all circumstances, whether she was so negligent as to defeat her recovery. *City of Rome v. Brooks*, 7 G. A. 244.

Where, in consequence of the falling in of a gate forming a part of a railing protecting an excavation in and along the margin of a public sidewalk in a town, the excavation being used to afford access to a private cellar, the plaintiff was precipitated into the excavation and injured, there was no error in declining to charge the jury

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that, if the plaintiff intentionally leaned upon the gate, he could not recover from the municipal corporation, or in instructing the jury that it was a question for them whether or not, under all the circumstances, the plaintiff was making a proper and legitimate use of the gate in question. It appearing by undisputed evidence that, at the instance of the municipal authorities, the gate had been made secure two days before the plaintiff was injured, and that it was safe on the evening before the injury occurred, and there being no evidence tending to show that these authorities had ascertained, or by ordinary care might have ascertained, that it had become insecure at the time of the injury, the plaintiff was not entitled to a verdict against the municipal corporation, and it was error to refuse a new trial. Lumpkin, J., said: "It is undoubtedly the duty of municipal corporations to exercise reasonable care over sidewalks, and the law imposes upon them the duty of reasonable inspection to guard against danger that should be expected. Cellar-ways, constructed for the purpose of descending from sidewalks to the basements of buildings, are necessities in a city or town; but the corporation should not allow them to become traps for pedestrians. Sidewalks should be kept reasonably safe, and openings in the same should be guarded; but whether or not defects in the means provided for guarding them will make the municipality liable is usually a question of fact, to be determined with reference to the surrounding circumstances. An impracticable or unreasonable amount of inspection should not be required of the corporation, but only such as prudence, good sense, and reason make necessary. Jones, Neg. Mun. Corp. §§ 94, 95, and cases cited. Where a defect which might lead to danger exists in a cellar-way opening upon a sidewalk, it is the duty of the municipal authorities to ascertain this defect, and have it remedied, but a reasonable time should be allowed for this purpose. If the defect had been in existence for only a short time, and the agents or officers of the city had no knowledge of it, or a sufficient length of time had not elapsed so that they ought to have known of it in the exercise of ordinary care and diligence, the corporation should not be held liable for an injury resulting because of the defect." Mayor, etc. v. Boone, 93/662. Cited, 123/825; 3 G. A. 173.

When the plaintiff showed that the door was left open after dark, that she fell therein and was injured, and that the occupant of the store with which the cellar was connected, was fined by the recorder

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of the corporation for a violation, on the occasion of the injury, of the ordinance which prohibits any person from leaving open a cellar-door after sundown, a nonsuit was properly refused. *City of Augusta v. Hafers*, 59/151.

490. Sidewalks, bridges on.

Where the sidewalk of a street crosses another street, and the crossing habitually used by foot-passengers is a bridge over a drain, there being no stepping-stone or other convenient crossing, such bridge so used is to all intents and purposes part of the sidewalk, and the city should be held to liability for damages sustained by foot-passengers on said bridge to the same extent as if the injury occurred on the sidewalk itself; and if the injury arose from a defect of the bridge, of which the city has notice, it is liable in damages for the injury sustained. *City of Atlanta v. Champe*, 66/659. Cited, 3 G. A. 550.

In *Mayor, etc. v. Johnson*, 84/279, the plaintiff sued for damages for injuries sustained by him in falling through a hole in a bridge on a public sidewalk. The hole was caused by the removal of a plank in the bridge, and the hole remaining for from five to twenty days, on one of the principal streets of the city, and within a short distance of the market-house. A verdict was rendered for \$1,500. The plaintiff was seriously and permanently injured and it was held that the verdict was not excessive. *Simmons, J.*, said that, under the facts disclosed in the record, the jury has exercised great moderation in assessing the damages. Cited, 113/564.

491. Sidewalks, hole in.

In *City of Atlanta v. Bellamy*, 72/420, the plaintiff sued for damages resulting from a fall caused by the defective condition of the paving on the sidewalk of a street. He stepped into a hole and fell. He testified that the hole was about four inches wide, eighteen inches long, and several inches deep. His witness stated that the hole had been there seven or eight months, and was not quite as deep as a brick is thick, about four inches wide, and about nine or ten inches long—that a common brick would more than fill it up. It was where two flagstones did not exactly come together, and most of the time a brick was in it. *Hall, J.*, said: "We think that no encouragement should be given to actions brought against towns and cities for the recovery of damages resulting from slight

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depressions or elevations made by displacing paving or flagstones, or bricks used in the construction of sidewalks and streets. As was remarked by Mr. Justice Crawford, in *Rivers v. City Council*, 65/378, 'Calamities and casualties are common to all, but because they occur it by no means follows that such as may be so unfortunate are entitled to recover compensation in damages out of some person, either natural or artificial, who may be able to respond, notwithstanding it appears that such impressions are beginning to prevail.' We can not entertain the idea that municipal corporations are insurers against accidents upon streets and sidewalks, or that every defect therein, though it may cause the injury sued for, is actionable. It is sufficient if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary mode, by night as well as by day. It is impossible to ascertain speedily when the bricks, paving and flagstones on the streets are out of place, and to keep promptly in repair at all times trifling defects arising from such causes. In all suits for damages resulting from such causes, these considerations should have weight with juries, whose peculiar province is to pass upon questions of negligence, under directions from the court." When this case was again before the court it was held that if the defect had existed for some time, the city is chargeable with notice thereof, and if it could have ascertained the defect, its failure to do so is negligence on its part and its liability is the same as if it had notice of the defect. And it was error to charge that the defect must have been of such character, so open and notorious, and must have existed such a length of time, in the judgment of the jury, to charge the city with notice.

In *City of Columbus v. Ogletree*, 96/177, the plaintiff alleged that he had sustained injuries from falling into a hole in a public sidewalk, which had been negligently left open by the city. The judge charged the jury that if "the policemen, who were the agents of the city, or in the employ of the city, had notice of the dangerous condition of the street or sidewalk, and they failed to take steps to repair the damage, or to repair the sidewalk so as to make it reasonably safe, then the city would be liable for injuries resulting therefrom." Lumpkin, J., said: "It does not appear that this charge was based upon anything contained in the charter or ordinances of the city of Columbus making it the duty of its policemen to look after and report the condition of its streets and sidewalks; but it

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would seem that the judge was undertaking to state what he regarded as the general rule upon this subject, without reference to charter provisions or municipal regulations. Thus regarded, we do not think the doctrine of the charge sound; certainly not to the extent of being alike applicable to all incorporated cities. In the absence of any ordinance or statutory provision specially defining the powers and duties of policemen, they are, presumptively, as at common law, mere peace-officers. *Throop*, Pup. Off. § 565. Ordinarily, therefore, it would not be presumed that a policeman was specially charged with any duty respecting the streets or sidewalks of a city; and if, as matter of fact, any such duty did devolve upon the police officers of a particular city, this fact should be made affirmatively and unequivocally to appear. In *Mechem*, Pub. Off. § 884, the rule in the case of an agent acting for a private principal is stated to be that the law imputes to the principal all notice relating to the subject-matter of the agency which the agent acquires while acting as such, and within the scope of his authority, etc. In section 845 the same rule is applied to private corporations, and it is further stated that 'notice or knowledge must have come to an agent whose powers and authority extend over the particular subject-matter to which the notice or knowledge applies.' And in section 846, while the author remarks that it is not yet fully settled by the authorities to what extent the rules applicable to private agencies will obtain in respect to public officers, he does distinctly assert that 'notice or knowledge in reference to a matter over which a public officer has no authority, and in respect to which he has no duty to perform, can not be deemed notice to the public.' Under these rules, it would seem that, unless it be affirmatively shown that a police officer has some duty to perform in reference to the streets or sidewalks, notice to him of their condition would not necessarily be notice to the municipal authorities." And it was held by the court that, it not having been shown that the duty of looking after and reporting the condition of the streets and sidewalks of the city devolved upon its policemen, it was error to charge that notice to "the police" of the defective condition of a particular street or sidewalk would be notice to the municipal corporation. On a second trial of this case such an ordinance was introduced and it was held that an ordinance making it the duty of policemen to report to the lieutenants of police all footways, bridges, and sidewalks requiring repairs necessarily renders it incumbent on the lieutenants to report

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upon the same to the authorities whose duty it is to have the needed repairs made; and therefore, under such an ordinance, notice to a policeman or a lieutenant of a defective or dangerous place in a sidewalk is notice to the city. Cited, 102/293; 114/197; 115/368.

Even if a municipal corporation may not be required by law to open for public travel and keep in good repair all parts of a broad street, yet, if it opens a street for public travel, such street must be kept reasonably safe for such use; and if it negligently leaves a dangerous excavation or ditch across or in a sidewalk without providing it with necessary railing or other means of protection, after notice or being charged with notice, and injury to one passing along the highway results therefrom, it will be liable, unless the injured person is prevented from recovering by reason of his own negligence. *Herrington v. Mayor & Council of Macon*, 125/58.

On the trial of an issue as to whether the material in a sidewalk was unfit for the purpose, and therefore was washed out by ponded surface-water, leaving a hole, evidence that subsequently the rain washed another hole in the same sidewalk, under similar conditions, was relevant. *City of Columbus v. Anglin*, 120/785.

A municipal corporation is not liable for injuries occasioned by defects in one of its sidewalks, when such defects were not brought about by its negligence, and were latent defects which could not have been discovered by the use of ordinary care and diligence. *City of Columbus v. Anglin*, 120/785.

492. Sidewalks; roots of a tree.

Where suit was brought against a municipal corporation, for damages incurred by reason of certain roots of a tree having been negligently left projecting above a sidewalk, in which roots the foot of a pedestrian at night was caught, causing her to trip and fall, and injuring her, it was admissible to show by another person that he was tripped and thrown down some days previously by the same roots at the same place. It was a circumstance to show that the sidewalk would occasion falls. In cases of doubt as to the admissibility of evidence, the current of authority in this State is to admit it and leave its weight and effect to be determined by the jury. *Gilmer v. City of Atlanta*, 77/688.

493. Sidewalks; awnings.

In *Mayor, etc. v. Caldwell*, 81/76, the plaintiff sued the defendant

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for negligently suffering an awning which extended over a sidewalk to be unsafe, by reason of which it fell upon the plaintiff and injured him. It was held that it was the duty of the city to keep the awnings over the sidewalks safe and prevent them from injuring passers-by.

While a person injured by an unsafe obstruction placed over the sidewalk by an owner of abutting property may have a right of action against the city for negligence in allowing the obstruction on the sidewalk, this does not affect the liability of the owner responsible primarily for such obstruction. The owner's liability arises from his negligent conduct in erecting and maintaining the dangerous obstruction on the sidewalk. The city's liability arises from its negligence in not keeping its sidewalk in a safe condition. A party injured by such obstruction has a right of action against either the owner or the city, or both; and if the city is forced to pay for the injury caused by the obstruction, it has, ordinarily, a right of action over against the owner. *Byne v. Mayor & Council of Americus*, 6 G. A. 48.

494. Sidewalks; a falling wall.

In *Parker v. Mayor, etc., of Macon*, 39/725, it appeared that a building, which was private property, and which stood at the line of, but not on, a public street, was burned, leaving some of the front wall standing. It stood for several months after the fire. It fell upon, and injured, the plaintiff. It was held that the city has power to remove buildings or other obstructions or nuisances in the public streets, sidewalks, etc., of the city, and under that power they were bound to keep the streets and sidewalks in such condition that it was safe and convenient to pass them, and in case of failure they were liable to any person injured by their neglect. If this wall was so much dilapidated or decayed as to endanger the lives of persons passing the street, it was a nuisance and the city should have removed it. If the wall was sound and steady and did not, under ordinarily circumstances, endanger any one passing the street, and it should be thrown down by tempest or other act of God, a person injured by the fall would have no right to recover damages for such injuries from the city. Cited, 55/568; 73/99; 93/675; 125/61.

495. Sidewalks, excavation in.

In *Mayor and Council of Atlanta v. Perdue*, 53/607, it appeared

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that an excavation was made in the sidewalk, by a party who was erecting a building, to allow grates to cover the area wall of the building. The injury occurred in the night, and the excavation had been there two or three weeks—there was no railing around it, nor were there any lights there. It was held that if the excavation had existed for such a length of time as by reasonable diligence in the performance of their duty the corporate authorities ought to have known of it, notice to them would be presumed, and proof of actual knowledge would not be necessary to render the corporation liable for the injury. Warner, C. J., said: "A municipal corporation is liable for injuries caused by its neglect or omission to keep its streets and sidewalks in repair, as well as for those caused by defects occasioned by the wrongful acts of others. In the latter class of cases the foundation of the action is negligence, and if the defect in the sidewalk or street had only existed for a short time, as a night or a day, so that the defendant could not reasonably be presumed to have had any knowledge of it, then notice to the defendant should be shown in order to make it liable. But if the defect in the sidewalk or street existed for such a length of time as by reasonable diligence in the performance of its duty, the defect ought to have been known by it, then notice will be presumed, and proof of actual notice is not necessary." Cited, 78/295; 113/156. In *Enright v. City of Atlanta*, 78/288, it was held that while the time during which a defect in a sidewalk existed may appear to the Supreme Court to be sufficient to charge the city with notice of its condition, yet it is not for the presiding judge to prescribe in his charge the length of time which will raise a presumption of negligence in not taking notice. Questions of negligence are peculiarly for the jury, and it was not error to leave to the jury to say whether or not, under the evidence, the time was sufficient to show negligence. Jackson, C. J., said: "These issues of negligence are peculiarly for the jury, and while this court did hold that two or three weeks were sufficient to show notice and want of diligence, in the case of *Perdue*, *supra*, yet it did not hold that the presiding judge should prescribe in his charge the length of time for the presumption of negligence in not taking notice, and control the finding of the jury on this issue involving negligence in the city." Cited, 7 G. A. 244.

If a defect in a sidewalk in a city has existed for such a length of time that by reasonable diligence in the performance of their duties the defect ought to have known by the proper authorities,

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notice will be presumed, and proof of actual knowledge will not be necessary in order to render the municipality liable for injuries occasioned thereby. *Idlett v. City of Atlanta*, 123/821.

496. Sidewalks, cotton-bales on.

Sidewalks in front of a warehouse must not be obstructed by piles of cotton-bales longer than is reasonably necessary to move the cotton from delivery-wagons into a warehouse. A stoppage of any part of the sidewalk longer than is necessary for such transfer becomes a nuisance, and if a passer-by be injured by such obstruction without negligence herself, the warehouseman is responsible in damages. Even if the cotton-bales be on the sidewalk but a reasonably necessary time for the transit from the wagons to the warehouse, and yet be placed on the sidewalk so negligently as to cause injury to the passerby by falling on her, the warehouseman is responsible. Evidence to the effect that the bales were set upon the ends so as to project from the sidewalk into the street and thereby a delivery-wagon struck against them, so projecting into the street, and one fell on and injured a lady, will support a verdict of negligence, as contrary neither to law nor evidence. *Mad-dox & Rucker v. Cunningham*, 68/431.

The limited right of an abutting owner to obstruct a public highway by reason of his business exigencies must be reasonably exercised; and it is subservient to the right of the public to safe passage. An obstruction, although temporarily justified, if it be not removed in a reasonable time, becomes a nuisance. *Brooks v. City of Atlanta*, 1 G. A. 678. Cited, 2 G. A. 372.

497. Sidewalks, lumber projected over.

Hazzard brought suit against the Mayor, etc., of Savannah, 77/54, to recover for a personal injury, caused by falling over certain lumber which was lying in a street, and which projected over the edge of the sidewalk. There was evidence on behalf of the plaintiff to the effect that the lumber had been lying in the street for about a week, in front of a building which was being repaired; and that on the night of the injury the street was not lighted. One witness testified that he noticed that some of it projected over the edge of the sidewalk two days before the injury to the plaintiff. Another stated that, while walking along the sidewalk, he had stumbled over the

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lumber on the night before the plaintiff was hurt. There were three successive verdicts for the plaintiff—the first for \$3,000, the second for \$3,700, and the third for \$1,400. The court below granted a new trial each time and announced that he would do so continuously and indefinitely because, in his judgment on the facts, there could be no recovery. It was held that this was error, and Jackson, C. J., said: “The lumber had lain in the street and a part of it projected over the sidewalk long enough, in our judgment, to charge the city with notice; and there being no light from the city lamps, or other temporary light, to warn citizens or others of danger on a dark night from the obstruction of the lumber projecting over the sidewalk far enough to cause the disaster, there is evidence of negligence sufficient to support the verdict, the question of fact being the peculiar province of the jury, and that body having three times, by three several and different representations of the jury-box each time, found for the plaintiff, and the last time a reasonable verdict, the law, which invests that body of men of the vicinage with the judgment over facts, as it does the presiding judge over law, will not permit this court in the last resort to allow the judge to control the jury ad infinitum upon facts, where there is evidence (though it be comparatively weak) on which repeated findings may rest.” This case, 72/205; 74/377.

498. Streets; bridges.

If a municipal corporation does not use ordinary care and diligence to make or keep a bridge over a ditch in one of its highways, whether constructed by it or not, a safe and convenient crossing for those using it as a passway over the ditch, both by day and night, it would be chargeable with negligence, and liable for whatever damages may be sustained in consequence thereof. *Town of Belton v. Vinton*, 73/99.

Where upon the trial of an action for damages against a city, for physical injuries alleged to have been caused by a defective bridge, it appeared from the evidence submitted in behalf of the plaintiff that the bridge in question extended from the street to the sidewalk over a drainage ditch, not at a regular public crossing or street intersection, and was built solely for the convenience of an owner of abutting land, and was not in general use by the public and was of no public utility: Held, that the granting of a nonsuit was proper, although it further appeared that prior to the plaintiff's injuries the

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city, after taking up the bridge for the purpose of deepening the ditch, had replaced the same and had subsequently made some repairs upon it, and that some of the public used it. *Crawford v. M. & C. of Griffin*, 113/562.

In *Mayor, etc., of Rome v. Dodd*, 58/238, the plaintiff fell through a hole in a bridge across a ditch in one of the defendant's streets, and was injured. The hole had been there for six weeks. The rule as to the liability of municipalities, stated in *Perdue's case*, *supra*, was repeated and enforced. Cited, 73/99; 113/564.

Although the charter of the city may not, in express terms, confer the power or impose the duty of keeping the streets and bridges within the corporate limits in proper condition and repair, yet where the charter grants to the corporate authorities the power to "impose such taxes upon all the real and personal estate within the corporate limits of said city as they shall deem necessary for the support of the government of said city, or for other purposes, and * * * enforce the collection of the same," and where these authorities have assumed and exercised corporate functions over the streets and bridges, and have negligently constructed or failed to keep in repair a bridge upon one of the public streets, whereby a traveler crossing the same sustains a personal injury, the corporation is liable to make compensation in damages, though no right of action be given by the charter or any statute. The right to redress for an injury occasioned by a defective structure erected and maintained by the corporation upon the public highway within the city is a right derived from the common law, and may be recognized and enforced under the circumstances of the present case. *City of Greensboro v. McGibbory*, 93/672. Cited, 100/360; 125/61; 127/131.

In *City Council v. Hudson*, 94/135, it was held that according to the decision in this case when before this court the first time (88/599), it was not incumbent on the plaintiff, in order to establish liability on the part of the defendant, to prove "that, under the statutes of South Carolina, the city is liable civilly for a failure to keep the bridge in repair." The approaches to a toll-bridge and its abutments, as well as the bridge proper, must be kept in repair by the owner, the whole having been erected by him, and, so far as appears, no duty resting upon the public to maintain the approaches or abutments as a part of the highway. The defect complained of having existed for a considerable period of time, no question could properly arise as to the duty of the owner to take notice of it. An allegation

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that railing was absent from the abutment of the bridge may be supported by proof that it was absent from the approach to the bridge. Lumpkin, J., said: "The evidence shows that the entire bridge structure, including the approaches and abutment on the South Carolina side, had been erected by the city council of Augusta, and there is not in the record the faintest suggestion that any duty rested upon the public to maintain either the approaches or the abutments as a part of the highway. The city council of Augusta being liable as any other proprietor of a toll-bridge over which the public are invited to cross, they paying for the privilege, while not an insurer of the persons or property of its customers, was bound, at least, to ordinary care respecting the safety of its bridge. 1 Thomp. Neg., p. 317, § 11. The duty of keeping the bridge in repair included the duty of repairing its approaches and abutments, and carried with it a corresponding liability for damages for non-repair, and also liability for injuries happening in consequence of the bridge being without suitable railings, or having railings defective or out of repair. *Id.* pp. 563, 564, §§ 8, 9, and cases cited. See, also, 2 Thomp. Neg. 770, and cases there cited. The defect complained of in this particular case having existed for some time, no question could properly arise as to the duty of the city council to take notice of it, and have it repaired. Certainly there was ample time for the municipal authorities to have discovered that the railing was missing, and to have had it replaced before the time when the plaintiff was injured. The approaches and abutments of the bridge all constituting, as above stated, parts of one and the same structure, an allegation that railing was absent from the abutment was supported by evidence showing that it was absent from the approach to the bridge. The question now under consideration, with reference to the facts of the case before us, is by no means the same as that presented in Daniels, 90/608. There, having reference to the rules of the company, and the statute requiring trains to slow down to a certain speed before running on or crossing any draw-bridge, it was held that the restriction as to speed applied to the bridge proper, and not to a long trestle constituting an approach thereto; the obvious purpose of the rules and of the statute being to prevent the precipitation of trains into the river when the 'draw' of the bridge was turned around for the passage of boats." See 458.

In *Mayor, etc. v. Hurst*, 111/453, it was held that a city is not liable for injuries resulting from the defective condition of a bridge

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over a road on private property, approached by a gate, and in no way controlled by the city or open to the public. This is true although the bridge is within the corporate limits of the city.

499. Streets, gullies in.

In *Mayor v. Cooley*, 55/17, it appeared that on a dark, rainy night, the plaintiff, who was unacquainted with the street, fell into a deep ditch or gully across one of the public streets of the city, and which the defendant willfully allowed to remain there. It had been there for some time and must have been known to the defendant. On the trial evidence which was offered to show a want of means with which to keep that street in repair, without detriment to more important streets, was held to be irrelevant.

In *Trippe v. City of Atlanta*, 68/834, it was held that a declaration alleging the following facts made a prima facie case and was not demurrable. Plaintiff was riding along one of the streets of the city, when his horse became frightened and ran away. Plaintiff succeeded in stopping him, when he began to kick against the dashboard, and plaintiff sprang from the buggy. The street for some distance in that vicinity was in very bad condition, and had been so for a considerable time, and the city had notice of the fact; there were deep and ragged gullies washed in the street and in the bottom of one of them was a deep and narrow rut; into this plaintiff's foot stepped, and being unable to keep his equipoise, he fell, his leg was broken, and he was badly injured. The injury would not have resulted but for the gully which defendant's negligence allowed to remain in its street, and was exclusively and wholly caused thereby.

There is no rule of law in this State that where a defect or dangerous excavation exists in a highway and is known to one who elects to use such highway, such election, even if justified by the dictates of ordinary prudence, must, as a matter of law, entail the consequences of a want of ordinary care and prudence. Where a ditch or gully has been left open for several months on the side of a public alley in a city, the alley being used generally as a thoroughfare and being a part of the street, it is not such contributory negligence per se, on the part of a person living near the alley, having knowledge of such ditch or gully, to walk on the alley to her home at night, as she had done on previous occasions, instead of taking another way to her home, as will justify a judgment of nonsuit. It is for the jury to determine, from all the facts and circumstances, whether the location

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of the ditch, and the hazard to result from an attempt to walk on the alley at night, was so great that the plaintiff, with knowledge of the defect, could not, as a reasonably prudent person, in the exercise of ordinary care, have elected to use said highway instead of taking another route to her home. *Harrell v. Mayor & Council of Macon*, 1 G. A. 413. Cited, 2 G. A. 380; 8 G. A. 718.

500. Streets; sewer open; subcontractor.

In *Mayor and Aldermen of Savannah v. Waldner*, 49/316, it appeared that the city let out to Van Horn the contract to build a sewer. He sublet the job. The contract stipulated that the work should be done under the supervision of the city surveyor, to see that the contract was complied with. It contained no provision to the effect that the contractors should erect lights at night. In doing the work, the subcontractors opened a sewer eight or nine feet deep across a public street. There were no lights placed at the opening to warn persons passing. At night, plaintiff was passing along the street on horseback. His horse stumbled and fell into the open sewer, and the injury to the plaintiff followed. The contest in the case was whether the city or the contractors doing the work were liable. The court held: "It is the duty of a municipal corporation, vested by law with authority over the streets, whilst dangerous works, such as sewers, etc., are being constructed across a street, to have proper precautionary measures taken to prevent accidents to passengers during such construction, whether the same is being done by the corporation through its own servants, or by contract, or by subcontractors under a primary contractor. Such duty, at least, in the case of independent contractors or subcontractors, is not founded on the principles of *respondeat superior*, but is deducible from the authority in the corporation over the streets and the obligation flowing therefrom to protect the public against nuisances or dangerous obstructions in the highways of the city." Tripp, J., said: "Upon principle and authority we hold that if the builders of the sewers negligently left it unguarded, by not having proper barriers, or lights, or other protection against danger, and it was permitted to continue for an unreasonable or unnecessary time by the municipal authorities, who had notice, or there are facts from which notice could be reasonably inferred, they are liable for injuries resulting from such neglect to perform their duty." Cited, 66/309.

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501. Streets, water-plug in.

In *City of Columbus v. Sims*, 94/483, the plaintiff sued for injuries sustained by him by driving his buggy at night against a water-plug or hydrant in one of the streets. He claimed that the city had caused this plug to be placed in the roadway used for vehicles (the usual place for locating such plugs being in the center of the street), and that there were no lights to give warning of the location of the plug. The court charged the jury: "The city having undertaken to light its streets, it was their duty, after they undertook to light that street, to have lighted the street in such manner as parties could see any obstruction in the street." It was held that a city which is under no statutory obligation to light its streets is not, as matter of law, bound, when lighting them voluntarily, to do it in such a manner as to enable persons using them to see any obstruction that the city may have placed in the street, irrespective of whether the obstruction, such as a water-plug, was a reasonable and proper one or not.

502. Streets, steps adjoining at railroad.

A street in the city of Atlanta crosses the track of a railroad, and the railroad company negligently allowed a pair of steps joining a part of the street where it crosses the right of way of the railroad to be out of repair and in a defective and dangerous condition. M. was injured by it. He sued the city to recover damages for his injury, and it was held that a municipal corporation having the care and control of the streets is bound to see that they are kept safe for the passage of persons and property. If this duty should be neglected, and one should be injured on account of such neglect, the corporation will be liable for the damages sustained. *Railroad Company v. City of Atlanta*, 74/774. Cited, 78/287, 780; 113/156.

503. Streets, railroad-cut in.

In *Jackson v. City Council*, 88/466, it was shown that the plaintiff's horse was injured by falling into a railroad-cut which defendant had allowed to be made across a public street, and which had, with the knowledge of defendant, remained open without a bridge or road excavation being built or made over or at the cut, and without a guard-rail or other thing for the protection of the public. It was held that there was evidence on which to submit the case to the jury, and the court erred in granting a nonsuit.

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504. Streets; material used by property-owners.

Property-owners placed material in a street for the purpose of paving in front of their residences. A city ordinance required them to prepare and place lights thereon during the night, so as to warn persons passing along the street of the obstructions. The lights were not so placed, and in consequence thereof, the plaintiff was injured while passing along the street. It was held that if the proper officers or agents of the city had notice of the failure and neglect to place the lights themselves or to require it to be done, or if the failure occurred for a sufficient length of time before the injury to have required the proper agent or officers of the city to have known it in the exercise of ordinary care and diligence; and they failed to place the lights themselves or require it to be done, and the plaintiff when passing along the street was injured by reason of the failure to provide lights, and she could not have avoided the injury by the exercise of ordinary care, then she could recover; but if the officers or agents of the city did not have notice of the failure to light the obstruction, and such failure did not occur for a sufficient length of time before the injury, so that they ought to have known of it in the exercise of ordinary care and diligence, then the plaintiff could not recover. This case is distinguished from *Donnelly's case*, 71/258, by the fact that special permission had to be obtained in that case to make the improvement. The city was thus notified of the obstruction. *Lewis v. City of Atlanta*, 77/756. Cited, 93/667.

A city may by reasonable ordinance limit the amount of space in the street which may be occupied by material assembled for the erection of a building on an abutting lot. A violation of such an ordinance is, as against a member of the public using the street for ordinary travel and injured by reason of such violation, per se wrongful and negligent; and the court may so instruct the jury. *William Bensel Construction Co. v. Homer*, 2 G. A. 369.

505. Streets; obstruction by fire company.

The primary purpose of a street is for passage and travel, and any unauthorized obstruction of its free use comes within the definition of a nuisance; and such obstruction as would leave the street in an unsafe condition or impair its use in an unreasonable manner or for an unreasonable time would render the city liable for any damage resulting therefrom. But the right of the public to use a street is.

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subject to such reasonable and necessary limitations as the city may impose upon it. Therefore, so long as an obstruction placed upon a street is temporary and reasonable in its character, and is intended for the public safety and convenience, its existence furnishes no cause for complaint. A good fire department is both necessary and useful to a city, and its efficiency is promoted by parades and practice. Hence to temporarily obstruct passage by stretching ropes across a street during a parade or practice of the fire department does not furnish any ground for damages against a city. *Simmon v. City of Atlanta*, 67/618.

506. Remedy over against wrong-doer.

A municipal corporation has a remedy over against a private party, or railroad company, who has so used the streets as to produce an injury, unless the municipal corporation concurred in the wrong. In a suit brought by the corporation to recover a sum of money as damages, which the corporation has been compelled by suit to pay to one who has been injured by a defect in the streets, and which injury occurred on a railroad-crossing, the record of the former suit is admissible evidence, if the railroad company had notice of the pendency of the former suit, and was requested by the municipal corporation to come forward and defend it. The judgment, notice having been given to the railroad company, would be conclusive as between the city and the railroad company as to the right of the injured party to recover, and as to the amount that might be recovered by the city against the railroad company. But such judgment would only be *prima facie* true that a recovery could be had against the railroad company for negligent conduct of its agents and employees; it would be competent for the railroad company to show that it was under no obligation to keep the streets in safe condition, and that it was not through its default that the accident happened. If it appears that there was fault, both on the part of the corporation and the railroad company, the former can not recover, for the reason that one of two joint wrong-doers can not have contribution from the other. *W. & A. R. R. v. City of Atlanta*, 74/774. Cited, 78/287, 780; 113/156. The same principle was determined in *Faith v. City of Atlanta*, 78/779. Cited, 6 G. A. 50.

Where a judgment for damages has been recovered against a municipality for negligence in permitting a dangerous obstruction to be erected and maintained in the street, and the owner of the abut-

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ting property who erected and maintained the obstruction has been duly and timely vouched into court to defend the suit, in a suit by the municipality over against the vouchee the judgment against the former is conclusive against the latter as to the right of the injured party to recover the amount of the verdict, and as to all defenses that either the municipality or the party vouched could have set up in the first suit, and which were actually set up and passed upon in that suit. See Code, § 5821 (5234). *Byne v. Mayor & Council of Americus*, 6 G. A. 48.

Inasmuch as the Code, § 910, requires that certain claims against municipal corporations shall be presented for adjustment to the municipal authorities before suit can be brought thereon, and allows such authorities thirty days within which to consider and act upon such a claim, suit can not be brought upon such a claim until after the municipal authorities have acted upon the claim or after the expiration of thirty days from the time the claim is presented, unless there is a legal excuse for failure to comply with the provisions of the act. *Saunders v. City of Fitzgerald*, 113/619.

Accord and satisfaction.

CHAPTER 33.

ACCORD AND SATISFACTION.

- 507. What is accord and satisfaction.
- 508. To be available as a defense it must be pleaded.
- 509. There must be a consideration for the release.
- 510. To avoid the release for fraud the fruit of the contract must be restored before suing.
- 511. Where not necessary to refund.
- 512. When estopped from claiming that release is not binding.
- 513. Attorney's fees.

507. What is accord and satisfaction.

Accord and satisfaction is where the parties, by a subsequent agreement, have satisfied the former one, and the latter agreement has been executed. The execution of a new agreement may itself amount to a satisfaction, where it is so expressly agreed by the parties, and without such agreement, if the new promise is founded on a new consideration, taking of it is a satisfaction of the former contract. Code, § 4326 (3732).

A paper signed solely by a party who claims a cause of action against another as a tort-feasor, acknowledging the payment of certain sums of money as in full settlement thereof, subject to certain terms and conditions therein expressed, is to be considered as an accord on condition or conditional release; and the failure of the alleged tort-feasor to comply with the conditions does not render him liable *ex contractu* as for a breach of the condition. Non-compliance with the conditions of the settlement will prevent the settlement from being pleaded as a full accord and satisfaction to the original liability. Equity in a proper case will reform a contract so as to make it speak the actual agreement between the parties; but courts will not make contracts for parties under the guise of reforming a unilateral undertaking. Cox, 133/763.

Evidence of compromise is excluded because inherently harmful and calculated to leave the impression on the minds of the jury that the settlement was an admission of responsibility, even though coupled with a denial of liability. The rule excludes propositions of compromise between the parties also excludes evidence of compromise between the defendant and third persons damaged in the same casualty. The error in admitting incompetent evidence as to a set-

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tlement was not cured by the fact that the defendant itself offered the writing in evidence to show that it contained a denial of liability. *Wallace & Co.*, 122/547.

In the trial of an action against a railroad company for personal injuries, where the defendant introduced in evidence a petition in a suit by the plaintiff against another corporation, filed before the date of the injury alleged to have been received at the hands of the railroad company, in which petition there are allegations that the plaintiff has sustained serious personal injuries at the hands of the defendant therein named, and, upon cross-examination, the plaintiff, in response to a question by defendant's counsel, testified, "I did get money; he paid me for my time," the fact that the plaintiff, over objection of counsel for the defendant, on his redirect examination was permitted to tell how much money he received, furnishes no ground for reversing the judgment of the court below denying a motion for new trial. *Gentry*, 128/429, 507.

508. To be available as a defense it must be pleaded.

Testimony offered for the purpose of proving an accord and satisfaction is inadmissible in behalf of a defendant whose answer does not set up a defense to which such testimony would be applicable. *Ingram v. Hilton & Dodge Lumber Co.*, 108/194.

In *Clem*, 80/534, there was a special plea, which was a sort of composite plea, embracing accord and satisfaction, covenant not to sue, and estoppel. All these special elements rested upon the alleged payment of \$100 as a consideration, and alleged acceptance thereof by the plaintiff. The plea set up that, in consideration of \$100, there was an accord and satisfaction, a covenant not to sue, and that the plaintiff was thereby estopped. *Bleckley, C. J.*, in reference to an assignment of error on the charge of the court, said: "The complaint is that, if there was a contract of accord and satisfaction partly performed, the plaintiff could not rescind as to the part performed without restoring the defendant to its original condition; and this is certainly the ordinary rule of rescission, where it is not a matter of mutual consent. Code, § 4306 (3712). But the rule does not apply to accord and satisfaction, because, in order for there to be accord and satisfaction, the accord must be executed. That is what makes the satisfaction. As long as the accord is executory, although it is partially performed, the original cause of action is not extinguished, and an action may be

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brought upon it, and the remedy for the defendant is to plead his part performance as satisfaction pro tanto. He gets credit for all he has paid upon it, but the right of action is not extinguished by an accord merely without complete satisfaction, where the parol contract is that performance is to constitute the satisfaction. If a promise is to constitute it before performance, then the accord is executed by the promise; but here there is no plea whatever that any promise was accepted in satisfaction, or made in satisfaction. The plea was that the payment of \$100—the actual payment—and the acceptance of it, were the satisfaction. If there has been a plea to the effect that the parties made an accord, and that the plaintiff accepted the promise of the defendant as a satisfaction, which promise was so and so, setting out the same, and the plea had been supported by proof, so as to come within the terms of the spirit of the Code, §§ 4326, 4327 (3732, 3733) on the subject, then there would have been no power to retreat; but the evidence indicated that the real contract ultimately made between the parties was, that the railroad company would pay Clem's expenses, doctor's bills, drug bills, and continue him on wages while he was disabled, and afterwards continue him in its employment on wages as long as he complied with the rules of the company—give him permanent employment. That was the contract which the evidence appears to establish. The right to have wages when he did not work, the right to have his medical and drug bills paid, and the right to continue permanently in employment, would form a good consideration for relinquishing his right of action for the tort. A promise of these benefits would suffice for the performance, if accepted as such. It would give a right of action against the company for a breach of the promise. The making of the promise would be the performance of the accord, and would therefore amount to a satisfaction of the tort. For such a promise to be available in bar, it must be pleaded and its acceptance averred."

509. There must be a consideration for the release.

In *Olds*, 77/673, the plaintiff applied for a ticket to take him from S. to L. The agent gave him one from S. to A., which was in the opposite direction. On the train to L. he produced the ticket, the conductor objected to it and put him off. Afterwards the company refunded the money he paid for the ticket. When he sued to recover damages for his injuries, the company plead

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accord and satisfaction founded on the return of the money. It was of no avail as there was no evidence that in receiving the money he intended to settle the wrongs done him.

Where a railroad company negligently inflicts a personal injury on one of its employees, and thereupon has him treated for the injury by the company's surgeon, a payment made by the company to the surgeon even at the employee's request, is no consideration for a release by the employee to the company for all damages occasioned by the injury, the company being liable for expenses of treatment which the injury occasioned. Walker, 92/485.

Carlton, 81/531, brought suit to recover damages for injuries sustained while engaged in coupling cars. At the time he was employed he entered into a written contract which provided, among other things, that if he was hurt while in defendant's service, by its negligence, he should be paid wages until he was able to work for not exceeding six months. The injury occurred on the 17th of February, and on the 19th of March, when there was due him for wages up to that date \$32.50, he signed the following paper: "While employed by the Western & Atlantic Railroad Company upon its road, I was injured on or about the 17th day of February, by being jerked off a car and having my hips and back injured, and the Western & Atlantic Railroad Company having agreed to pay thirty-two and 50-100ths dollars in full for all wages due me to date, and in full for all damage which I have sustained on account of said injury, I hereby acknowledge receipt of said sum in full satisfaction as aforesaid, and in full of all demands to this date. Atlanta, Ga., Mch. 19, 1886. S. M. Carlton. Approved, W. C. Morrill, V. P." The court charged the jury that the legal effect of that contract of settlement barred the right of plaintiff to recover. The charge was held to be error, and Blandford, J., said: "What was settled between the parties, and what did the plaintiff receive? He received his wages for one month; the wages which the company by its contract had bound itself to pay him. Any agreement on his part to receive his wages in satisfaction of the damages he might be entitled to on account of injury sustained by him by reason of the company's negligence would be a nudum pactum, and would not bar his recovery. It does not appear that the wages were in dispute. It was shown that he was entitled to \$1.25 a day; and that he was paid for a month of working days, which amounted to \$32.50. To this amount he was entitled; and

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he was entitled to more. The company was bound by the contract entered into at the time of his employment to pay him his wages for six months, or until his recovery, in case of his being injured by the company's negligence. And the fact that they paid him the wages is good evidence that he was injured by the negligence of the company. Indeed, he showed by his evidence that he was hurt without fault on his own part, and the presumption in such case is that the company was at fault. But if he received the amount stated, or less than that, in satisfaction of his wages, he would be bound by it, so far as his wages were concerned. But it does not appear that he received anything at all for his damages. It should have been left to the jury to determine whether or not the wages, as well as the damages, were in dispute, and it was for them to determine whether or not the settlement covered all." Plaintiff in an action for personal injuries, may testify to the circumstances under which he signed an instrument claimed to be a release of the demand sued on, and that the instrument introduced by defendant, to which his signature is attached, and which he was asked if he had signed, was not in fact the instrument signed by him, though defendant's vice-president, who procured the release, be deceased.

In *Petty*, 109/666, it was held that a contract between an employee and his master, or another acting in the latter's interest, by the terms of which the employee, when physically injured, whether as a result of his own negligence or not, or when sick, is to receive pecuniary and other valuable benefits, and which stipulates that his voluntary acceptance of any of such benefits in case of injury is to operate as a release of the master from all liability on account thereof, is not contrary to public policy. That such a contract secured to the employee substantial benefits, and that the master contributed to the fund for the payment thereof, constituted a valuable consideration, as to the employee; and this is true though he himself made a small monthly contribution to that fund. A contract of this kind is not wanting in mutuality. The acceptance by an injured employee of any benefit under a contract of the kind indicated is an election on his part to look exclusively to that source for compensation on account of the injury, and amounts to a complete accord and satisfaction of his claim for damages against his master therefrom arising. Cited, 115/853.

A stipulation manifestly designed for the benefit of the company, to the effect that a beneficiary would not be paid under the relief

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and hospital system unless the employee first filed with the proper officers of this department satisfactory releases, does not authorize one who has received benefits at the hands of this department in accordance with his terms of membership therein, to prosecute his claim for damages merely because he has failed or refused to execute such a release. *Carter*, 115/853.

In *Crusselle v. Pugh*, 67/430; 71/744, it was alleged that plaintiff was employed by defendant as a striker for a blaster, who was also in the employment of defendant; that by reason of the negligence of the blaster he was injured, and as part compensation for the injury defendant agreed to let the plaintiff have a certain house and lot for life; that plaintiff occupied the place for some years, and was then ejected by defendant. It was held, that a blaster lost his eyes while in the service of the owner of a rock-quarry, or of his contractor or lessee, and that the owner gave him a house and lot for life, as compensation for the injury received, and to prevent any suit against himself or his lessee, furnished a good and valuable consideration to support a conveyance so made. The injured blaster having been in possession, under such a settlement, for more than seven years, and being unable to give security in order to resist, by counter-affidavit, a warrant to dispossess him, if the feoffer caused him to be ejected under such a warrant, it was a tort for which a recovery could be had.

510. To avoid release for fraud the fruit of the contract must be restored before suing.

In *Hayes*, 83/558, the plaintiff sued for damages for personal injuries. The defendant pleaded the general issue and accord and satisfaction in this, that the parties had agreed upon a settlement by which defendant had received \$100 in satisfaction of his injuries and had also released his right of action for damages. The plaintiff attempted to reply to this plea by showing that the agreement of settlement was procured from him by fraud. It was held that he could not successfully reply by showing that the agreement of release was procured by fraud without also showing that before commencing suit, he had tendered to the defendant the sum received with demand of return of what defendant received from him, thus rescinding the settlement. *Blandford, J.*, said: "While fraud may vitiate or avoid all contracts, the contract is nevertheless not void, but voidable only, at the instance of the person defrauded. He

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who perpetrates the fraud can not avoid the same, or vitiate it, on account of his own conduct. It may be a good contract until it is avoided by the action or at the instance of him who is defrauded. Though, because of the fraud, the injured party may in certain cases terminate it, and require a restoration of the status quo, in technical language, the contract is said to be voidable, not void. Big. Frauds, 73, 74. Something must be done by the party defrauded before the contract can cease to bind. When that something has been done, and the engagement has been terminated, the contract is said to have been rescinded, and the process by which this result is effected is called rescission. Id. 74. A contract may be rescinded, out of court, at the instance of the party defrauded, where an agreement has been made, and something of value has been received by the defrauded party, whether vendor or purchaser it matters not. This must, before suit, be tendered back to the wrong-doer in the name of rescission, with demand of return of what the wrong-doer has received. The object of the tender is to effect a restoration of the status quo, and in this class of cases it is a condition precedent to rescission. Id. This is not an action on the part of the defendant to rescind the contract either at law or in equity, but it is an attempt on his part to recover damages which he has by virtue of his contract of settlement released to the plaintiff in error. It is clear that the contract or agreement of settlement between these parties is binding upon the plaintiff in error, and could not be rescinded or set aside at its instance. If it is binding on one side, it must be binding on the other side, so long as the same exists. It did exist at the time this action was brought. It never had been rescinded, and consequently, while it bound the plaintiff in error, it must of necessity have been binding upon the defendant in error. There are exceptions to the general rule as stated; but the present case falls within the rule stated and not the exceptions thereto." Cited, 88/598; 97/560; 109/675; 124/750; 129/216.

This plaintiff claimed that the company induced him to enter into the contract by fraudulently persuading him, through its superintendent and employed physician, to believe that his injury was not a material one and would not be permanent, and the allegation was held to be insufficient, as it was not alleged that any artifice, trick or contrivance was used to prevent him from ascertaining the true nature of his injury and its probable duration, these matters lying as much within his knowledge, or means of knowledge, as within

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the knowledge of the defendant, its officers, agents or employees. Hayes, 89/264. Cited, 102/139.

Where an accord and satisfaction is fully executed, the party receiving money from the other can not rescind on the ground of fraud, or of his own mental incompetency to make a binding contract, without refunding, or offering to refund, the money which was the fruit of the accord and satisfaction. If any exception to this general rule results from inability, by reason of poverty, to restore the money, it is only where the fraud is not discovered, or the mental disability continues, as the case may be, until after the money has been expended, or otherwise put beyond the power and control of the plaintiff. To use and appropriate the money, with knowledge of the imposition, would be a ratification of the settlement. Strodder, 94/626. Cited, 95/263; 129/216.

When this case was a second time before the court it was held that if the general rule that one who, on the ground of fraud or of mental incompetency to contract, seeks to rescind an executed agreement of which he has received the fruits, must, before bringing his action, make or offer to make restoration to the opposite party, admits of any exception because of the plaintiff's inability from poverty to meet this requirement, such exception certainly can not obtain unless the fraud remained undiscovered or the mental incapacity continued until after such fruits had been put beyond the power or control of the plaintiff. Atkinson, J., dissenting. 99/595.

In an action against a railroad company by an employee to recover damages for a personal injury alleged to have been sustained by the employee while traveling as a passenger, where the railroad company pleads the employee's release upon a consideration of one dollar as an accord and satisfaction, it is competent for the employee to amend his petition by alleging that the release was procured by fraud. An amendment which alleges that the employee was induced to sign the release upon the false representation of the agent that the company's surgeon pronounced his injury slight, and that he would be able to resume work in a few days, and upon the company's agent delivering to him at the time an order directing the employee's immediate superior officer to restore him to his former situation, signing the superintendent's name, which order was issued without the superintendent's authority and repudiated by the company, and that as soon as he was refused employment he tendered the dollar to the agent who gave it to

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him, which tender was refused, is sufficient to raise the issue of fraud in the procurement of the release. Nichols, 135/11.

The evidence for the defendant company showing that the plaintiff had accepted and receipted for a given sum of money in full settlement of a claim for damages on account of personal injuries received, and it appearing from the plaintiff's own testimony, when fairly construed in connection with the undisputed facts of the case, that at the time of the settlement the company owed him nothing for wages; that he had no lawful demand against it, of any kind, other than his above-indicated claim; and that the settlement was made for the purpose of satisfying this claim, and it therefore being in any just view of the evidence, indisputable that damages resulting from the personal injuries were the subject-matter to which the settlement related, he was not, under the principle laid down by this court in Hayes, *supra*, entitled to recover, it not appearing that before bringing his action he had tendered to the defendant the money paid him, or had made any effort whatever to rescind the contract of settlement. This case differs from that of Butler, *infra*. Burke, 97/560. Cited, 109/680; 129/216.

In Petty, 109/666, it was held that a contract will not be set aside, on the ground of fraud in its procurement, at the instance of one who has neither restored, nor offered to restore, the fruits thereof. Lumpkin, P. J., said: "As a matter of course, if Petty was, by any artifice or fraudulent misrepresentation on the part of the defendant company or its agents, induced to sign a contract, the terms and conditions of which he did not understand and voluntarily assent to, the same would not be legally binding upon him, and he would be at liberty to repudiate it at pleasure, provided he offered to restore to the opposite party all fruits received by him thereunder. Hayes, *supra*. In the present instance no such offer was made, or excuse suggested why this eminently just and reasonable requirement of the law was not complied with before bringing suit. The position taken by Petty at the trial was that he had a right to retain all the fruits received by him under his contract; ratifying the same to this extent, but repudiating it in so far as his own obligations thereunder were concerned. That is to say, he claimed the privilege of being arbitrarily inconsistent—a privilege the exercise of which a litigant can not lay claim to as matter of strict legal right, the same having been long conceded to be a prerogative belonging exclusively to the judiciary. Nevertheless, in sup-

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port of this position, counsel rely upon the case of Butler, *infra*. There it appeared that the plaintiff 'sought to make the question that the written instrument, in the form of a receipt and release, which the company produced, showing on its face an accord and satisfaction touching the cause of action declared upon, was procured from him by fraud. The instrument was signed with his mark, and he denied that he ever entered into such a contract, or that the same was read over to him. He admitted that the amount specified as paid to him was paid, but denied that it was paid on any such contract. He contended that it was paid upon his claim for wages, and that, in signing the instrument, he thought he was subscribing to an ordinary pay-roll, only.' In other words, his grievance was, 'not that he was induced by fraud to enter into a contract, but that a fraudulent advantage was taken of him, by procuring his signature to a writing which purported to set forth a contract into which he never entered. On this theory, the money he received was no fruit of such a contract, and could not have been, because none such was ever made.' Accordingly, it was held that, taking as true his version of the transaction, he really received 'nothing which he ought not to have had independently of any agreement, fraudulent or not fraudulent, touching his claim for damages on account of the personal injury sued for,' but merely what, so far as appeared, he was strictly entitled to under another and entirely distinct claim against the company—the contract of settlement, concerning which the writing did not truly and correctly set forth, but actually misrepresented. Clearly, under such circumstances, it was not incumbent upon the plaintiff, as a condition precedent to bringing his action for personal injuries, to offer to restore the fruits of a settlement of an entirely distinct claim, which he had in good faith accepted, and was undoubtedly entitled to retain, notwithstanding the alleged fraud perpetrated upon him in procuring him to sign a release wholly different from that which he had agreed to execute. This case does not come within the letter or spirit of Butler's case, *infra*." Cited, 115/853.

One who, for valuable considerations, including the payment to him of a given sum of money, has released another from all further liability for personal injuries sustained by the releaser, can not, even upon legal grounds, obtain a rescission of such contract of release, and recover upon the original cause of action, without first

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restoring, or offering to restore, to the releasee what he paid for such release. *Harley v. Riverside Mills*, 129/214.

Where one who had suffered a personal injury on a railroad received from the agent of the companies operating such road \$1,750 in settlement, and gave to him a receipt and contract discharging and releasing the original company and its lessees from all claims for damages of every kind, nature, and character, growing out of or incident to such injury, such person could not afterwards repudiate or rescind the contract by alleging that, when the agent obtained it, he agreed that at the time of delivering it to the lessee companies he would obtain from them a writing stating that, if the injuries of the plaintiff proved more than of a merely trivial character, an additional amount in accordance with said injuries would be paid, and that the agent transmitted the receipt and acquittance, but did not obtain the additional paper as he had promised to do. A parol promise to add terms to a complete written contract is different from an agreement not to deliver a paper except upon the happening of some event; and this case differs from those of *Hansford v. Freeman*, 99/376, and *Moore v. Farmers' Mutual Ins. Ass'n*, 107/199. While the petition contains certain allegations touching the unfitness of the plaintiff to transact business when she made a contract of settlement on account of personal injuries which she had received, yet, taken as a whole, the allegations show that she understood the situation and the instrument which she was signing, and that she negotiated in parol for an additional stipulation to be afterwards made. Where the petition discloses that the real cause of complaint was because of an alleged parol promise to supplement a complete written contract, it will not be saved from a demurrer by reason of the allegations in regard to the plaintiff's condition arising from the injury and the medicines administered to alleviate pain, or the insistence of the agent of the railroad company in effecting a settlement. *Smith*, 131/470.

511. When not necessary to refund.

In *Butler*, 88/594, it was held that where accord and satisfaction are embodied in a written instrument which the plaintiff has signed with his mark, and he denies that he ever entered into such a contract, or that the same was read over to him, and claims that the amount paid him was not paid upon such contract, but upon his claim for wages, and that in signing he thought he was subscribing to an ordinary pay-roll only, it is not necessary for him to refund

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the amount received to entitle him to make the question of fraud in imposing upon him the written contract, into which he did not enter, in lieu of the actual contract, under which the money was paid to him. Bleckley, C. J., said: "It is quite true that if the plaintiff had made any settlement or entered into any accord touching the injury complained of in his declaration, and now sought to open the same on the ground of fraud, he would have to tender back any money which had been paid to him in consequence or by way of execution of the settlement or accord. Hayes, *supra*. The reason is that to attack a contract on the ground of fraud involves an admission that such a contract was made, and also an election to rescind it; and the rule of rescission always is that the opposite party must be placed in statu quo. But where the plaintiff, instead of attacking a contract for fraud, merely attacks a writing which purports to embody such a contract, and alleges that his signature to the writing was appended without knowledge of its contents, and under the belief that he was signing another document, he neither admits that the contract was made nor seeks to rescind it. His grievance is not that he was induced by fraud to enter into a contract, but that a fraudulent advantage was taken of him by procuring his signature to a writing which purports to set forth a contract into which he never entered. On his theory, the money he received was no fruit of such a contract, and could not have been, because none such was ever made. The money, as he contends, was paid him as wages which he claimed then, and still claims, as due him under a previous and wholly different contract. Taking all he says as true, he has received nothing which he ought not to have had independently of any agreement, fraudulent or not fraudulent, touching his claim for damages on account of the personal injury sued for, and he denies distinctly that the contract set forth in the writing was ever made. Mullen v. Railroad Co., 127 Mass. 86. The true question is, therefore, not whether he could be heard without tendering back the money, but whether, as a rule of evidence, he is estopped from controverting the truth of the contents of the writing. That he is an illiterate person is apparent from the fact that he subscribed the instrument by making his mark, his name being written by some one else. He testifies that he can not read, and that the document was not read over to him, and that he thought he was signing an ordinary pay-roll." Cited, 97/560; 109/675. When this case was again before the court it

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was held that the main issue on the trial of an action for personal injuries against a railroad company being whether or not the plaintiff, who could neither read nor write, had for a specified sum of money released the company from all claims for damages resulting from such injuries, and had knowingly signed, by making a cross-mark, an instrument of writing to that effect; and the evidence for the plaintiff, if true, showing that he had not so released the company, and that when he signed the paper it was not read over to him but that he was misled by the company's servants as to its real contents, and by them made to believe it was merely a receipt for money he claimed to be due him as wages; while the evidence for the company, if true, showed that plaintiff had released the company, and had signed the paper with a full knowledge of its contents, and the jury having determined this issue in the plaintiff's favor—this court, under our system, constituting the jury the tribunal to decide all questions of fact, and especially to pass upon the credibility of witnesses, has no authority to set aside their verdict, after its approval by the court below; it being in all other respects fully supported by the evidence, and there being no complaint that any errors of law were committed at the trial. *Butler*, 91/52.

One seeking to hold an infant bound upon a contract, for the reason that the consideration of the contract was retained after arrival of the infant at majority, has imposed upon him the burden of showing possession of the consideration after majority and retention for a sufficient length of time that a ratification of the contract is to be inferred. If the infant "has lost, expended, or squandered the consideration during his minority, this is nothing more than the law anticipates of him, and he can not be required to purchase the right of reclaiming his own by still further abstractions from his estate." A "linter" in an oil-mill, who is an infant, is not engaged in a profession, trade, or business within the meaning of the Code, § 4235 (3650) so as to make him bound by a contract made with his employer in reference to a claim for damages for personal injuries sustained in the course of his employment. The fact that an infant is receiving the proceeds of his own labor is not alone sufficient to establish that permission on the part of his parent has been given to engage in the business in which the amounts received by him are earned. *Dukes*, 121/787.

In *Donnelly v. Cuthbert Ore Company*, 131/695, the plaintiff brought suit for damages against the defendant, on account of per-

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sonal injuries received on November 9, 1905, while in its employment. The defendant filed an answer and pleaded an accord and satisfaction, besides filing a demurrer to the original petition and demurrers to some of the allegations in the amendments thereto. In the amendments filed by the plaintiff he sought to reform the writing given by him to the defendant and pleaded it as an accord and satisfaction of the plaintiff's claim for damages. The writing was dated November 22, 1905, was signed by the plaintiff, and recited that he had received from the defendant \$100 in full settlement, accord and satisfaction of any and all claims or demand which he had by reason of the injuries referred to. In amendments filed by the plaintiff, he alleged that certain material terms of the agreement has been omitted from the writing and he prayed that the writing be reformed. The court announced that the demurrer would be sustained unless the plaintiff offered to restore the \$100 paid him by the defendant. Plaintiff declined to do this, and the court granted an order that the demurrer wherein the petition was attacked for the failure of the plaintiff to restore such sum be sustained. Holden, J., said: "Plaintiff does not seek to have the court either to rescind or ignore the writing, but to reform it, and in its reformed and proper condition to preserve, recognize, and enforce it. He asks that when the writing is put by the court in the condition of telling the truth about the agreement, it be given effect by crediting the \$100 on the plaintiff's claim for damages." It was held that if a person who was illiterate and could read and understand writing only with difficulty when in his normal condition, and who, by reason of his physical and mental condition resulting from a personal injury and being under the influence of opiates administered to relieve his pain, was unable to read, was, while in such condition, induced by the fraud of the other party to a contract between them to sign a writing as evidencing such contract but which in fact omitted some of the material terms thereof, he may maintain an equitable petition to have the writing reformed so as to speak the truth of the agreement made.

512. When estopped from claiming that release is not binding.

In *Jossey*, 109/439, it was held that one who signs a contract, which recites that, in consideration of a stated sum paid him by a railroad company, he releases it from all liability for a personal

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injury, which he contends was caused by its negligence, will be estopped from claiming that the release is not binding upon him, because he thought, when he signed the contract, that it related only to the time he lost in consequence of the injury, and did not cover damages caused thereby, when it appears that no fraud of any kind was practiced upon him, and that, having ample opportunity and capacity to read and understand the contract before he signed it, he negligently failed to do so.

In *Cassin*, 111/576, it appeared that George Cassin was injured by the defendant company, May 6, 1892. He instituted suit, and while the action was pending the company paid him \$2,500, taking a receipt stating that it was "in full settlement of my action against said company now pending in the city court of Atlanta, and also in full settlement of all and any claim for damages on my part arising out of the injury received by me on or about May 6th, 1892." More than five years after the injury, Cassin died, and his widow thereupon brought suit against the company for his homicide, alleging that his death was caused by the injury negligently inflicted by the company. She, too, died, and the suit was then continued in the name of the children. It was held that an action for the homicide of a husband or father, alleged to have been occasioned by a physical injury, is not maintainable when it appears that he, while in life, voluntarily settled with the wrong-doer therefor, and discharged the latter from all liability for the damages resulting therefrom. *Cobb and Lewis, JJ.*, dissenting. Cited, 125/471; 116/297.

In *Tankersley*, 133/153, it was held that where an action for damages on account of a personal injury was brought against a railway company, and the defendant in its answer pleaded a release from liability, but there was no request for the court to require further pleading on the part of the plaintiff, and evidence was admitted for the purpose of attacking the release on the ground of fraud in its procurement, there was no error in refusing to charge, that, "There being no allegations in the plaintiff's petition that the release of all damages for a valuable consideration, if you have such in evidence before you, was obtained by defendant by fraud, you will not consider the question of fraud in procuring the same, and you will find for the defendant on its plea of release from all liability." *Atkinson, J.*, said: "Pleas and answers may be demurred to as now provided by law, and if new matter is set up by the defendant, not controverting the plaintiff's petition, the plaintiff, in proper cases,

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may be required by the court to meet the same by appropriate written allegations." Code, § 5633 (5050). In order, however, to seek to require the plaintiff to thus plead further, application must be made to the court. If none is made and the case proceeds to trial upon the petition and plea of release, evidence sustaining the plea may be met by counter evidence to show its procurement by fraud. In such event it would not be proper to charge the jury, upon request, to disregard this rebutting evidence on the ground that the plaintiff had not in his pleadings attacked the release for fraud. *Frick Co. v. Taylor*, 94/683 (21 S. E. 713); *Beard v. White*, 120/1018 (48 S. E. 400).

The fact that the petition in an action against a railway company affirmatively alleged negligence on the part of the defendant does not estop the plaintiff from so amending a second petition, brought in renewal of that action within six months of its dismissal, as to make the same allege that in point of fact the plaintiff did not know that such negligence existed until after the bringing of the first action, and that because of ignorance of such negligence the plaintiff had been fraudulently induced by an agent of the company to enter into an accord and satisfaction with it. A petition thus amended, and in other respects good, is not demurrable because of the plaintiff's apparent want of good faith in alleging a fact without knowledge of its existence; nor as setting forth a new cause of action; nor as being barred by the statute of limitations, the first action having been brought in due time. The petition in the present case, as amended, is not open to demurrer on the ground that the facts alleged showed want of diligence on the part of the plaintiff in discovering the alleged fraud by which she was induced to enter into the accord and satisfaction; nor did the plaintiff's allegations show undue delay in offering to rescind. Nor are any of the special grounds of demurrer to the petition as amended, not covered by the rulings announced above, meritorious. *Pollard*, 116/297.

513. Attorneys' fees.

The case of *Eagle & Phenix Manufacturing Co. v. Welch*, 61/444, was for a personal injury to an employee engaged in blasting. The plaintiff made a settlement with the company by which the latter paid the physician's bill, the plaintiff's wages during his confinement on account of his wounds, paid him \$100 and gave

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him a suit of clothes. This settlement was made after notice from plaintiff's counsel of their claim to one-half of what might be recovered for fees, and with the understanding with the attorneys that the litigation should proceed for the purpose of fixing the amount to which they would be entitled. An agent of the company went with the plaintiff to the depot, purchased a ticket for him to Mobile and saw him on the train. Plaintiff said he was going to Black Hills, and he had not been seen nor heard from to the time of the trial. His testimony on a former trial was offered and admitted over objections. A verdict was rendered for \$250, "being one-half the damages awarded plaintiff." It was held that as the suit was not proceeding for plaintiff's benefit, but to enable his counsel to realize their fee, he was upon the footing of any other witness, and, as he was inaccessible, what he testified upon the previous trial was competent evidence under § 5773 (5186) of the Code.

The mere engagement by a prospective suitor of an attorney at law upon a contingent fee does not give rise to a lien for fees in favor of the latter upon the cause of action respecting which he is employed; but, upon the filing of a suit by him, a lien attaches in his favor upon such suit, in such manner as that the plaintiff and defendant are not at liberty to settle the same so as to defeat his claim for fees. If however, pending the suit, the plaintiff and defendant do in fact compromise and settle their differences, and upon the trial a nonsuit is awarded, the suit thus commenced is thereby ended; and, if another action upon the same cause be thereafter brought, the defendant may plead such settlement in bar of the renewed suit, and as well in bar of the right of plaintiff's counsel to prosecute the same for the recovery of contingent fees alleged to be due. His right to prosecute depends upon the existence of a lien in his favor. The lien being extinguished by the nonsuit, whatever would bar the plaintiff's right bars his. *Brown*, 101/80.

The lien provided in subdivision two of § 3364 (2814) of the Code in favor of attorneys at law upon a suit does not arise, as against the defendant in such suit, until there has been either service of process or actual notice of the filing of the petition. It follows, therefore, that where a settlement is had between the plaintiff and the defendant, and the latter is ignorant that the petition has been filed at the time of the settlement, such settlement would be a bar to a recovery by the plaintiff in such suit of fees due him

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under a contract with his attorneys. It being apparent from the record that the plaintiff constituted a certain person her agent to receive the money which the defendant had agreed to pay her in its contract of settlement, it was error to charge the jury that the settlement "was not completed until the consideration to be paid to the plaintiff was paid to her, and accepted by her in satisfaction." Such settlement was complete the moment the agent received payment for the check given him in satisfaction of his principal's claim. *Reagan*, 104/353.

In *Owens*, 119/833, it was held that while attorneys at law have the same right and power over suits brought in behalf of their clients to enforce their lien for fees as their clients have, and such suits may be prosecuted for the benefit of the attorney having a lien, notwithstanding a settlement between the parties to the suit, made without the knowledge or consent of the attorney, still there can be no recovery in behalf of the attorney, unless the evidence is of such a character as would have authorized a recovery by the client if the suit were still proceeding for his benefit. The evidence being of such a character that a recovery in behalf of the plaintiff would not have been authorized, a finding in favor of the attorneys who were prosecuting the suit to enforce their lien for fees was unauthorized, and the court erred in not granting a new trial. *Cobb, J.*, said: "If a person testify in his own behalf, and there are material conflicts and contradictions in his testimony, he is not entitled to recover, if he be the plaintiff, unless that portion of his testimony which is least favorable to his contention is of such a character as to authorize a recovery in his behalf. The rule just referred to was first laid down in the case of *Evans*, 96/481. It was recognized and approved in *Freyermuth*, 107/32, and *Southern Bank v. Goette*, 108/796 (2). Applying this rule to the plaintiff's testimony, the case presented shows that at the time she drove upon the track she knew the car was approaching, both from the noise and the light, though her view of the track was obstructed by the wagon. Under such circumstances, any prudent person would have taken some precaution to ascertain how near the car was from the point where the attempt to cross was to be made; and to attempt to cross under the circumstances indicated by the plaintiff's testimony, where she had full knowledge that the car was approaching and did not know how near or how far it was, or at what rate of speed it was running, was such an act of negligence

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on her part as would preclude a recovery by her. She should at least have taken the precaution to ascertain how near the car was, before attempting to cross the track, when she was on notice, both by the noise and the light of the car, that it was approaching. This seems to be a case where the plaintiff, knowing the danger deliberately took the risk of being able to cross before the car could reach the point where she intended to cross, and made an error of judgment as to the time that would elapse before the crossing could be made or before the car could reach that point. Such an attempt, under such circumstances, was an act of gross negligence on her part, and evidenced such a lack of prudence as to entirely defeat a recovery by her." Dis., 3 G. A. 409.

The mere failure of a railroad company to settle a claim for damages, even after the party holding the claim had been invited to discuss the matter of settlement, is not stubborn litigiousness rendering the company liable for attorney's fees in an action brought on the claim. Stewart, 125/88. Cited, 132/76.

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CHAPTER 34.

PERSONAL INJURIES INFLICTED IN ANOTHER STATE.

- 514. General principles.
- 515. Illustrations; the common law.
- 516. Right of action, and defenses.
- 517. Rules of evidence.
- 518. Suits of foreign administrators.
- 519. Foreign laws proved.

514. General principles.

Unless the contrary appears, the common law is presumptively of force in any given State whose jurisprudence is founded on that law.

The courts of Georgia will determine what is the common law.

At common law, the death of a human being could not be complained of as injury in a civil court. In such a case, the right to recover depends for its existence upon the law of the State where the homicide occurred.

When an action is brought in the courts of Georgia to recover damages for a tort committed in another State, and the right to recover depends for its existence upon a statute of that State, such statute must be alleged in the declaration, and proved on the trial of the case.

When an action is brought to recover damages for a tort committed in another State, the rule as to what conduct of the deceased person shall or shall not constitute a defense to the action is governed by the law of the State where the injury occurred.

Matters of right are determined by the law of the place where the cause of action arose; matters of procedure and practice are determined by the law of the forum, and the quantity or degree of evidence requisite to sustain an action or to change the burden of proof is matter of procedure and practice.

In *Decker*, adm'r, 5 G. A. 21, it was held that the laws in force at the situs of a tort usually determine the civil results of its commission. In suits based on torts committed in other States, the courts of this State will enforce and will be governed by the *lex loci delicti*, subject to the usual exceptions recognized as being applicable in cases involving private international law. The courts of this State will not enforce a foreign law which is solely penal,

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or which contravenes the public policy of this State. The courts of this State, while yielding in the construction of the statutes of another State to the interpretation and effect given by the decisions of the highest courts of that State, will nevertheless determine for themselves whether the statute as construed and applied is penal, or violative of the public policy of this State. The statute of the State of Alabama authorizing a civil action for unlawful homicides, as construed and applied by the Supreme Court of that State, is not penal in the international sense. A statute is not penal in the international sense merely because it awards only punitive damages, measuring the amount by the culpability of the wrong-doer. The statute of the State of Alabama authorizing a civil action for negligent homicide is not violative of the public policy of this State because the measure of damages to be awarded under it is dissimilar to the measure prescribed in like cases by the statutes of this State. The policy of this State tends toward the preservation of actions beyond the death of the parties; and the courts, therefore, do not hesitate to enforce the statutes of other States and foreign countries substantially similar to the English statute known as Lord Campbell's act, though the elements of damage sought to be compensated may be variant from what is deemed adequate or just in this State. The courts of this State will not exclude Alabama suitors, so long as the courts of that State do not exclude Georgia suitors. Only in this sense is the expression "reciprocity is comity" applicable to causes of action springing from wrongful deaths occurring in Alabama. It is not competent for any foreign legislature to prescribe what laws shall be recognized and enforced in the courts of this State, even though the law as to which cognizance is sought to be excluded is a statute of the State whose legislature seeks to create the exclusion. Where suit was brought in this State on account of a personal injury occurring in the State of Alabama, and no statute of that State was pleaded or shown, this court will presume that the common law was of force there. *Cunningham*, 123/90.

515. The common law.

Under the common law, which, unless the contrary appears, is presumptively of force in any given State of the American Union whose jurisprudence is founded thereon, a carrier of passengers has the right to make reasonable rules and regulations for the con-

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duct of its business. A rule of a railroad company operative in the State of Tennessee requiring passengers who fail to supply themselves with tickets sold at three cents per mile to pay conductors cash fares at the rate of four cents per mile is reasonable. Coyle, 112/121.

This court is not bound by the interpretation of the common law made by the courts of Alabama, although the injury for which suit is brought occurred in that State, but this court will decide what is the common law. As to the construction which the courts of that State place upon its own statutes or other local laws bearing upon the case, this court will follow their decision. What the decisions of the courts of Alabama are on the question of the liability of the master for an injury done to one servant by the negligence of another, and who are fellow servants, is left in doubt. Krogg, 77/202. Cited, 123/94; 131/666.

In Tanner, 68/384, it appeared that the contract by which plaintiff was employed was made in Georgia and the injury occurred in South Carolina. The court said: "Assuming, but not deciding, that the law of the place of the hurt is the law of the case, the law of South Carolina, and not of Georgia, will be applied by the courts of Georgia to the cause when tried in this State, except in so far as mere modes of procedure and matters of practice in court are concerned. There being no statute regulating the rights of parties in such cases in South Carolina, and the common law prevailing there, the court here, in a liberal spirit of comity, will apply the construction of the common law in that State by its highest judicial tribunal to the facts of the pending case." Cited, 122/94.

Where suit is brought in this State to recover damages for personal injuries sustained in the State of Alabama, the rights of the parties as to the merits of the case are to be determined by the law of Alabama; and where no statute of that State is pleaded or shown, it will be presumed that the common law is in force there. While the courts of this State will follow the decisions of a sister State in construing the statutes thereof, they are not bound by the interpretation placed upon the common law by the courts of other States. In the present case, no statute of the State of Alabama having been pleaded, the rights of the parties as to the merits of the controversy were dependent upon the common law of master and servant, the general principles of which, as applicable to the case, are embodied in the Code, §§ 3130, 3131 (2611, 2612). Lay, 131/345. Cited, 7 G. A. 270.

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In *Whitfield*, 7 G. A. 268, Hill, C. J., said: "The injuries complained of were received in the State of Tennessee, and his right to recover depends upon the law of that State. He failed to plead any statute of Tennessee relating to the subject, and it will therefore be presumed that the common law defining the relative rights of master and servant is of force in that State. Under the common law one servant can not recover damages from the master for personal injuries caused by the negligence of a fellow servant. Cited, 8 G. A. 515. Lay, *supra*.

In an action in this State by a servant against his master for an injury occurring in another State by reason of defective machinery furnished by the master, it will be presumed, unless the contrary be shown, that the common law prevails in such other State. The declaration in such case, brought under the common law, must allege, not only that the servant was ignorant of the defect, but also that he could not have discovered it by ordinary diligence, and that the master knew or ought to have known of it. *Miller*, 113/15. The plaintiff amended the petition and when the case came again to this court it was held that a petition by a servant against his master for injuries resulting from defective machinery, which alleges that the plaintiff did not know the fact that defects existed in the machinery, and could not have discovered the same by the exercise of ordinary care and diligence, but that the defendant did know this fact or could have known it by the exercise of such care and diligence, in effect states that the servant "had not equal means of knowing such fact." *Miller*, 115/92. See 541.

516. Right of action and defenses.

Action by a wife for the homicide of her husband depends for its existence upon the law of the State where the homicide occurred, and when the right of action is given by the law to the personal representative for the use of the wife and children, the wife can not sue alone and in her own name. *Strong*, 52/461.

Mrs. Lacy, 43/461, alleged that her husband had been killed in the State of Alabama by the Selma, Rome & Dalton Railroad Company, and it was held that an action can not be maintained in this State for an injury done within the State of Alabama without an allegation in the declaration that the laws of the State were similar to our own in relation to the injury complained of. In the ab-

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sence of such an allegation, the courts of this State will presume that the common law is of force in that State. When the case was remitted to the court below, the plaintiff amended her declaration, by setting forth the law of Alabama which was supposed to authorize the action. It gave the right of action to the personal representative. There being no valid cause of action in the original declaration there was nothing to amend by. 49/106. Cited 68/390; 123/92; 5 G. A. 30.

When an action by an employee against a railroad company to recover damages for a personal injury inflicted by the company, through its agents, while he was in its employ, is tried in a different State from that in which the contract of employment was made and in which the injury was received, the right of the plaintiff to recover, and the rule as to what conduct on his part shall or shall not constitute a defense to the action, are governed by the *lex loci*, and not by the *lex fori*. Under the constitution of the State of South Carolina, "knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." Therefore, on the trial of a suit in the courts of this State, instituted by a coupler or brakeman against a railroad company, to recover damages for an injury sustained by him while in its service in the State of South Carolina, alleged to have been occasioned because of its negligence in furnishing him with unsafe and defective machinery, it was not error for the court to give in charge to the jury the above-quoted portion of the fundamental law of South Carolina on the subject. Thurman, 106/804.

The Alabama statute, now embodied in section 2590 of the Code of that State, rendering a master or employer liable to a servant for an injury "caused by reason of any defect in the construction of the ways, works, machinery or plant connected with or used in the business of the master or employer," does not prevent the defendant in an action brought under this statute from setting up as a defense that there was contributory negligence on the part of the plaintiff. Harbin, 110/808. Cited, 111/713; 112/84.

The plaintiff, an employee of a railroad company, having been injured by a locomotive of the defendant in the State of Alabama, and the employer being, under the law of that State, liable to answer in

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damages for personal injuries received by an employee in the service or business of the employer, when such injuries are "caused by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the * * * employer," and there being evidence introduced by the defendant from which, in connection with evidence introduced by the plaintiff, the jury could reasonably infer that the track of the defendant, at the place where the plaintiff was injured, was full of coal and coke, in most places as high as the rails, and in some places higher, and was "dangerous for men to switch around at night;" that the track had been in this condition for some time; and that the injuries complained of were attributable to these obstructions on the track—a verdict in the plaintiff's favor was not unwarranted. *Mitchell*, 95/78. Cited, 106/808.

So far as appears, the degree of diligence due respectively between employer and employee under the laws of Alabama is no more than ordinary diligence. Ordinary diligence is that care which every prudent man exercises under the same or similar circumstances. *Mitchell*, 92/77. Cited, 120/94.

According to the decision of the Supreme Court of Alabama in *Railroad Co. v. Bridges*, 86 Ala. 448, the damages, under sections 2590-2592 of the Alabama Code, to be recovered against a railroad company for the homicide of an employee, are generally not punitive, but compensatory. *Chaffin*, 84/519. Cited, 5 G. A. 30.

Under the construction placed by the Supreme Court of Alabama upon the subsection of the employer's liability act of that State (Civil Code of 1896, § 1749; Civil Code of 1907, § 3910), which provides that an employer is liable for a personal injury received by his employee, "when the injury is caused by any defect in the ways, works, machinery, or plant connected with or used in the business of, * * * the employer," a wire stretched over and across the track of a railroad company, not sufficiently high above a freight-car running on the track to permit an employee standing on the top of such car to safely pass under the wire, does not constitute a defect in the way or track, where there is nothing to indicate that such wire is not a mere movable object temporarily placed too near the track. *Hubbard*, 131/658.

The plaintiff pleaded and proved an actionable injury under the "employers' liability law" of the State of Alabama. When a tort occurs in another State and suit is brought on account of it in the

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courts of this State, the *lex loci delicti* governs as to all substantive matters, the *lex fori* as to all matters affecting only the remedy, such as rules of evidence, methods of shifting the burden of proof, and the presumptions arising from given states of facts. The Georgia rule that a railway employee suing the company for the negligence of a fellow servant must show that he himself was free from fault is a rule of substantive law, and is without applicability where a railway employee sues the company for an injury received in another State, where no such doctrine prevails. Where one party offers a section of the code of another State as proof of the law of that State on a given subject, he is not required to introduce all cognate sections. If there are other sections applicable, the opposite party may offer them, but can not complain that his adversary has not done so. Robertson, 7 G. A. 154.

In James, 115/313, the injury complained of occurred in Florida and the action was brought under the laws of that State, and the plaintiffs failed to introduce evidence sufficient to furnish the jury a basis for any estimate of the plaintiffs' damages. The verdict for the defendant was, therefore, demanded, and the court did not err in refusing a new trial. Simmons, C. J., said: "There was no evidence before the jury to furnish a basis of recovery for the plaintiffs, and no data from which they could legally deduce the plaintiffs' damages. The law of Florida, as set out in the petition, provides that in every action such as this 'the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed.' It was, therefore, incumbent upon the plaintiffs to show the amount of pecuniary damages they sustained by reason of their father's death. There was evidence as to the father's earning capacity, but none whatever as to his expenses. He boarded at least half his time in a city other than that of his residence, but it does not appear what board he paid. There is no evidence as to any of his other expenses. As a result we think it was not possible for the jury to have made any legal estimate of the plaintiffs' damages. There was no data as to the amount the deceased had spent upon his children or as to what he would probably spend upon them. We think that, for these reasons if for no other, the jury could have found no verdict other than one for the defendant. While it is impracticable to determine accurately the amount of damage in a case like this, the burden is upon the plaintiffs to give some data upon which an estimate can be based."

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Under the statutes of the State of Florida, "Where the widow sues for damages for the death of her husband by the wrongful act of another, in estimating her pecuniary loss the jury may properly take into consideration her loss of the comfort, protection, and society of the husband, in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any; but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the injury. She is also entitled to recover reasonable compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the station or condition in society which he would probably have occupied, according to his past history in that respect, and his reasonable expectations in the future; his earnings and acquisitions to be estimated upon the basis of deceased's age, health, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death,—all these elements to be based upon the probable joint lives of the widow and husband. She is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate, in case her life expectancy be greater than his. The sum total of all these elements to be reduced to a money value, and its present worth to be given as damages. Within these limits the jury exercises a reasonable discretion as to the amount to be awarded, based upon the facts in evidence, and the knowledge and experience possessed by them in relation to matters of common knowledge and information." The foregoing being the construction given the Florida statute by the Supreme Court of that State, it will be followed by the courts of this State. Where a statute of a sister State is pleaded and proved, the courts of this State will follow the construction adopted by the courts of that State, although no proof is made by the party that such a construction has been announced by those courts. *Sasser*, 4 G. A. 276. Cited, 5 G. A. 24, 675; 7 G. A. 159.

A petition for damages, by the administratrix of one who was killed in the State of South Carolina while admittedly trespassing

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on the right of way of a railroad company, which alleges that the killing was negligent, careless, and wanton, but the specific allegations of which distinctly negative any idea of gross or wanton negligence, is fatally defective, and should be dismissed on general demurrer. Under the laws of South Carolina, it is necessary to a recovery, under the circumstances mentioned, that the killing should have been due to wanton negligence. Shigg, 117/454. Cited, 5 G. A. 564; 6 G. A. 260.

517. Rules of evidence.

In the trial of an action for a tort committed in another State, the rules of evidence applicable to a tort of like class, committed in this State, are to be administered, whether the rules of evidence in the other State be the same as in this or not. Bleckley, C. J., said: "Touching the evidence requisite to make a *prima facie* case in behalf of the plaintiff below, the court gave in charge to the jury the rule of law applicable in this State between the parties where the action is against a railroad company for a personal injury sustained by one of its employees in consequence of the negligence of the company or of a coemployee. This was correct, although the injury sued for was sustained in the State of Alabama. The quantity or degree of evidence requisite to sustain an action or to change the burden of proof is determined by the law of the forum, and not by the law of the place where the cause of action arose. It belongs not to the law of rights, but to the law of remedy. It is matter of procedure and practice, or of the law of evidence in its relations thereto. What evidence, and how much, will suffice for verifying in the courts of this State, a right to recover in a given action or class of actions, is determined by the laws of this State, and them alone. These courts often have to look elsewhere for the law of rights, but they never look elsewhere for the law of remedies, or for any part of the same. A tort committed in Alabama is proved here just as the same class of torts, when committed here, are proved. The same presumptions prevail, and the same measure and degree of evidence will shift the burden of proof from the plaintiff to the defendant." Mitchell, 92/77. Doubted, 7 G. A. 154.

518. Suits by foreign administrators.

It is a general and well-settled doctrine, that no suit can be maintained or brought by an executor or administrator, in his official

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capacity, in the courts of any other country, except that from which he derives his authority. Accordingly, when a citizen of Alabama is killed in the State of Georgia, his administratrix under letters granted to her in Alabama, can not maintain a suit in the State of Georgia for the killing. Paulk, 24/357.

In Nix, admr., 68/572, it was ruled that as the South Carolina Railroad had been allowed to extend its line into Georgia, with the condition attached that suit might be brought against it in this State on all claims upon it, the right to sue it here was not confined to the citizens of Georgia, but extended to citizens of other States. Therefore, a foreign administrator upon complying with the conditions for the bringing of suits by such persons, might sue the corporation in Georgia, although the administration was in South Carolina, and the right of action accrued under a statute of that State. Cited, 73/652; 101/733.

In Smith, 119/667, it was held that under the Tennessee statute upon which the present suit was based, the personal representative of a deceased has a right to recover for his homicide, in the event he left surviving him a widow, and in that event it is immaterial whether there were also children. Allegations in the petition referring to the children of the deceased, when the suit is based upon the fact that there was a widow, are irrelevant, and should be stricken as surplusage. Whether under the law of Tennessee the recovery would be for the sole benefit of the widow, or the children would be interested therein, is not now decided; the defendant not being concerned with what shall be done with the proceeds of the recovery, in the event it is paid to the personal representative who, under the law of Tennessee, has a right to bring the suit. Cited, 119/789, 125/455. This case appeared again, 1 G. A. 162, and it was held that under the statutes of Tennessee, the right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrong-doer in case death had not ensued, does not abate, or is not extinguished, by his death, but passes to his widow, and, in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin. Therefore, when the employee of a railway company is killed in Tennessee by the negligence of the company, either his administrator or his widow can bring suit for such negligent homicide. In either case the recovery inures

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to the beneficiaries designated by the statute. Where such a suit was brought in this State by the widow, suing as administratrix, for the benefit of herself as widow, an amendment striking the descriptive word "administratrix" from the declaration, and leaving the suit to proceed in the individual name of the widow, was properly allowed. Code, §§ 5690, 5689, 3937 (5106, 5105, 3361). The right of amendment, being remedial and pertaining solely to the method of procedure is governed by the *lex fori*. Such amendment does not substitute a new party for the original plaintiff, or make a new cause of action, so as to open the case to the statute of limitations, but the amendment relates back to the commencement of the action, so as to defeat the bar of the statute of limitations. Cited, 4 G. A. 530. To the same effect, Wilson, 119/781.

A homicide done by a railroad company of this State upon a line owned and controlled by it in Alabama is actionable in this State, and the administrator of the deceased in Alabama, for the use of the widow and children, could bring suit in this State by complying with the statutory requirements thereof, and thus having his appointment quoad hoc ratified in Georgia; but not otherwise. And if an administrator of the decedent be appointed in Georgia, he may bring the suit for like purposes. Swint, admr., 73/651. Cited, 5 G. A. 29; 121/391.

The court properly overruled the defendant's motion to dismiss the case on the ground that it was without jurisdiction to try the same, inasmuch as a Georgia corporation which transacts business in another State may be sued in this State by a non-resident for injuries inflicted in that State. Evans, 121/391.

A temporary administrator is, for the time being, the "personal representative" of the intestate for the purpose of collecting assets, and so continues until permanent letters are granted. He can maintain an action for the homicide of this intestate, the right to which is conferred by statute upon the "personal representative," under Code of Alabama, § 2591. Chaffin, 84/519. Cited, 5 G. A. 30.

519. Foreign laws proved.

In Jackson, 86/676, Simmons, J., said: "While the trial judge might have resorted alone to the statutes and the decisions of the Supreme Court of Tennessee, we can not say that it was error to receive the testimony of skilled attorneys, who practiced in the courts of that State to aid him in arriving at a proper conclusion

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as to what was the law of the State, and especially as to the practice of the courts thereof in regard to appeals and their dismissal. The testimony was not for the jury, but for the information of the judge, and he was not bound by the opinions of these attorneys; but it was his duty at last to decide the law himself, aided by these opinions and by such other sources of information as were accessible to him. Knowing, as we do, the great difficulty under which courts labor in arriving at the true law of a case, and especially the difficulty encountered here as well as in the court below in this case, we can not condemn a trial judge for resorting to any sources of information which will aid him in coming to a correct conclusion as to the law. The record shows that the judge in this case did not confine himself to the opinions of the attorneys, but that the statutes of Tennessee and the decisions of its Supreme Court were read to him. Moreover, in some States that have no statute like our own quoted above, Code, § 4420 (3824), evidence of this kind is the proper mode of proving the law of another State; and the Supreme Court of the United States has so held. 116 U. S. 1, 6 Sup. Ct. Rep. 242; 119 U. S. 615, 7 Sup. Ct. Rep. 398." Cited, 103/480; 117/102.

"The public laws of the United States, and of the several States thereof, as published by authority, shall be judicially recognized without proof." When it appears in the manner above indicated that a particular law has been of force in another State, until the contrary is shown it is presumed that such law is still of force. *Quære*: Do not the provisions of the Code, § 5818 (5231) quoted above, place the laws of other States, when "published by authority," upon the same footing as all laws of this State, both public and private are placed by the provisions of the Code, § 5797 (5210) when so published? Phillips, 117/98.

Pleadings.

CHAPTER 35.

PLEADINGS.

- 520. Petition and modes of defense.
- 521. When a demurrer should be sustained.
- 522. The proper charge when negligence in several particulars is alleged.
- 523. When on contract or in tort.

Suits Against Railway Companies by Strangers.

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- 548. Subject continued.
- 549. Subject continued.
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- 566. When plaintiff may urge negligence not declared on.
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520. Petition and modes of defense.

All suits in the superior courts for legal or equitable relief, or both, shall be by petition to the court, signed by the plaintiff or his counsel, plainly, fully and distinctly setting forth his charge, ground of complaint and demand, and the names of the persons against whom process is prayed. Code, § 4960 (5538).

In *Miles*, 2 G. A. 79, it was held that, every petition should set forth the facts upon which the cause of action is based "plainly, fully, and distinctly," and with such certainty that the same may be understood by the defendant who is to answer them, the jury who are to ascertain the truth thereof, and the court who is to give judgment. The plaintiff is not required to set forth the evidence, either direct or circumstantial, by which he expects to establish the traversable facts alleged in the petition. The certainty required as to the allegation in a suit by a servant against his master for personal injuries occasioned by a defective instrumentality is discussed. Powell, J., said: "As to pleadings at common law it has been said on eminent and unquestioned authority (*Chitty on Pl.* 256): 'The principal rule as to the mode of stating the facts is that they must be set forth with certainty, by which term is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment.' Our Code, § 5538 (4960) requires that the plaintiff, in his petition, shall plainly, fully, and distinctly set forth his

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charge, ground of complaint and demand. As construed by the courts of this State, this statutory provision requires a higher degree of certainty in pleading than was necessary at common law; but the object to be attained is the same under both systems, to wit, that the pleadings be understood by the party, the jury, and the court. They certainly ought to be so certain and full that the court may look to the allegations of fact and know whether a cause of action is set forth or not. The plaintiff is not required to set forth the evidence, either direct or circumstantial, by which he expects to establish the traversable facts alleged in the declaration, and a demurrer can not properly be used to compel him to do so; but all the facts necessary to be stated should be set forth plainly, and special demurrer will compel this. In negligence suits, in order that the court may determine from an inspection of the pleading whether a cause of action is set forth, each fact necessary to raise the duty and to show the specific breach thereof, or the specific wrong inflicted, should be plainly and unequivocally stated; and enough of the details of each element of the case should be set out to clearly distinguish the transaction as an actionable one and not to leave it doubtful whether it is so or not. Many facts, especially those resting peculiarly within the knowledge of the opposite party, may be alleged in general terms; but they should be alleged as facts, not merely as legal conclusions." Cited, 2 G. A. 313, 765; 4 G. A. 107; 5 G. A. 673.

In *Hardy, Adm'x*, 131/238, it was held that where, in an action against a railroad company for the negligent killing of a person, the petition is framed in separate paragraphs consecutively numbered, in which it is plainly and distinctly averred that such person was killed by the operation of the defendant's locomotive and cars, and the answer to these paragraphs only denies the allegations "so far as the negligence of this defendant or its employees is charged," the killing of the person by the defendant's locomotive and cars is not a controverted fact, and any error in receiving evidence tending to establish this fact is harmless.

General allegations that a plaintiff was injured by reason of the negligent conduct of a railroad company, or the like, unless accompanied by allegations of fact showing negligence, are subject to special demurrer. *Lumpkin, J.*, said: "The plaintiff in his petition must allege facts, not merely conclusions. General allegations that the defendant was negligent, or that the plaintiff was injured

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by the negligent conduct of the defendant, or the like, will not alone withstand a special demurrer. The pleader should state wherein the negligence consisted. He must plainly, fully, and distinctly set forth his cause of action. If he has done this, he is not required to enter into elaborate statements of minutiae." Harris, 129/388.

If a declaration alleges with sufficient specification negligence on the part of the defendant and its agents or employees, and in what such negligence consisted and when it occurred, it is not necessary to set out the names of the particular agents or employees alleged to have committed it. Ryals, 123/331. Cited, 131/377.

A pleader may, without subjecting his petition to demurrer, allege matters by way of general conclusion, where the specific facts upon which the conclusion rests are detailed with requisite definiteness. Pacetti, 6 G. A. 97.

An allegation that "the plaintiff charges that the defendant knew of the defective condition of the condenser, on account of the fact that for several days previous to the explosion the engine had not been properly working and had by its actions given full warning that it was in a dangerous and defective condition," is subject to special demurrer upon the ground that it is not alleged in what respect the engine had not been properly working, and because it is not alleged what actions of the engine gave warning that it was in a dangerous and defective condition. Green v. Babcock Brothers Lumber Co., 130/469. Cited, 5 G. A. 217, 225.

The petition, while setting forth a transaction apparently actionable did not set it forth with sufficient certainty; hence the court did not err in dismissing the action, upon timely special demurrer pointing out the deficiencies. Powell, J., said: "Where a petition has set forth the particulars of a transaction with definiteness, the conclusions of negligence on which the pleader relies may be stated in general terms. These grounds fall, of course, by the sustaining of demurrers to the prior allegations on which they are based; but in themselves they are not the subject of demurrer on the grounds stated." Jarrell v. American Pipe Bending Machine Co., 2 G. A. 764. In this and the Miles and Helms cases, Powell, J., discusses the allegations necessary to a perfect suit by a servant against the master for personal injuries. See, 2 G. A. 79, 308.

In Austin, 122/823, it was held that a petition containing one count, in which two causes of action are set forth, will on special demurrer be held bad for duplicity. A petition containing several

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distinct counts which do not differ in any substantial particular from each other will, on motion filed at the first term in the nature of a special demurrer, be dismissed unless the surplus counts are eliminated by amendment. A petition containing several counts, each referring to the same transaction, but differing from each other in substantial particulars as to the details of the transaction, is not bad for duplicity. Cited, 123/31. This petition contained three counts, the second of which was stricken on demurrer, and the first and third held to be good by the trial court. After the affirmance of this judgment by the Supreme Court, the defendant company offered an amendment to its answer, setting up the plea of *res adjudicata*, which plea was predicated upon the judgment striking the second count of the petition. The trial judge, over the objection of the plaintiff, allowed the amendment to be filed as a part of the pleadings, but in his written order recited that "the facts and law as set out in this amendment are not passed upon by the court, as to whether or not they constitute a good plea of *res adjudicata*." The case came again to the Supreme Court and it was held that a plaintiff who sues to recover damages for a personal injury may embrace in his petition two or more separate counts, setting forth different accounts of the manner in which he was injured, so as to meet any anticipated variations in the proof which may be adduced at the trial; and a judgment striking one of the counts on the ground that no cause of action is therein stated will not be a bar to his prosecution of the suit upon another count in his petition. An order allowing a plea of *res adjudicata* to be filed, over the objection of the plaintiff, as a part of the defendant's pleadings, is not to be regarded as conclusive upon the former as to the merits of the plea, when the order expressly recites that the court does not undertake to pass upon the question whether or not the plea sets up a good defense. So long as the case is in *limine* and there is not estoppel of which the party filing the plea may take advantage, it is within the power of the court, of its own motion, to order it stricken as legally insufficient in matter of substance, or to instruct the jury to disregard the defense thereby sought to be interposed. If the plea be without merit and there is no estoppel upon the plaintiff to call into question its legal sufficiency, the defendant can not justly complain that the trial judge entirely ignored it when instructing the jury as to the issues involved in the case, and thus deprived the defendant of all benefit of the defense of *res adjudicata*. 127/121.

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In Keel, 3 G. A. 769, Powell, J., said: "Keel alleged that he was at one of the defendant's stations, preparing to board a car as a passenger. As the car approached he signaled the motorman to stop and the motorman saw the signal and wound up the brakes, but failed to get the car to a complete stand at the station, and went past it. As the car passed, plaintiff boarded the step of the front platform safely. The motorman saw him. As plaintiff was stepping from the step of the car to the platform, the motorman threw off the brakes; the car jumped forward and jerked, knocked and threw the plaintiff off the car, he was thrown under the wheels, and certain enumerated injuries ensued to the damage of the plaintiff. * * * The case rests solely upon the proposition that a release of the brakes caused the car to jump forward with a jerk; a proposition wholly contradictory of the laws of physics and to ordinary experience. * * * A party will not be permitted to maintain in his pleadings a contradiction of those things of which the court is required to take judicial cognizance. Of the primary physical laws the courts must take notice. 16 Cyc. 854 (8). Therefore the pleading is demurrable when it sets up a contradiction of these laws. Since a physical impossibility can not exist at all, it can not be admitted even by demurrer. Such an allegation must be treated by the courts just as they would treat an allegation that what is not law is law, i. e. it must be wholly disregarded. Therefore the court erred in not sustaining the general demurrer. Compare McEwen, 120/1008." It was held that an allegation in pleading which contradicts anything of which the court must take judicial cognizance is absolutely nugatory and will be disregarded. The courts are required to take notice of primary physical laws. Fairly construed, the petition in this case asserts a physical impossibility and is therefore demurrable. Cited, 5 G. A. 673.

Modes of defense. A defendant may either demur, plead, or answer to the petition, or may file one, or more, or all of these defenses at once without waiving the benefit of either; or he may file two or more pleas to the same action. In all cases demurrer, pleas and answer shall be disposed of in the order named; and all demurrers and pleas shall be filed and determined at the first term, unless continued by the court, or by consent of parties. Code, § 5047 (5630).

In Motz, 130/414, it was held that where, at the appearance term

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of the case a general and a special demurrer were filed, the latter was not amendable at a later term by adding thereto new and independent grounds of demurrer. Lumpkin, J., said: "Whether a mere inadvertent or accidental omission from a ground of special demurrer, or an inaccuracy, or imperfection therein, could be cured by amendment, presents a different question from the claim of right to add new and independent grounds after the time allowed by law for filing a special demurrer has elapsed. Also the practice of moving to dismiss a case because no cause of action is set forth is not here involved." The test of the sufficiency of a petition to resist a general demurrer is the ability of the defendant to admit all that is alleged therein and yet escape liability altogether. A general demurrer to the petition should not be sustained and the suit dismissed because the plaintiff would not be entitled to recover all he asks, if the petition sets up a good cause of action as to any portion of his demand.

A demurrer addressed to a particular paragraph of the pleadings is not necessarily, for that reason, a special demurrer. "A general demurrer enables the party to assail substantial imperfections in the pleadings of the opposite side, without particularizing any of them in his demurrer; a special demurrer goes to the structure merely, and not to the substance, and obliges the party demurring to lay his finger on the very point." *Martin v. Bartow Iron Works*, 35/323. "Demurrer, being a critic, must itself be free from imperfections." *Swindle*, 2 G. A. 550. Cited, 5 G. A. 667.

In *Pierce*, 120/230, it was held that a petition in a suit against a railroad company, alleging that the plaintiff's husband was an engineer of the company and was killed by the derailment of the engine which he was running on the defendant's road, without fault on his part, and averring that such killing was "negligent, wrongful, and inexcusable," was not open to general demurrer. But a petition containing only such general allegations of negligence was not sufficient to withstand a special demurrer setting up that it failed to set forth any specific acts of negligence. *Fish*, P. J., said: "Was the petition sufficient to withstand the motion, in the nature of a general demurrer, to dismiss it? This depended on whether the defendant could have admitted all the allegations of the petition and escaped liability. *Pullman Palace Car Co. v. Martin*, 92/161-164; *Rayford*, 115/937. From the allegations of the petition it appeared that petitioner's husband was an employee of the

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defendant; that, while in the discharge of his duty as such, he was killed by the running of defendant's locomotive, and that he was, at the time, wholly without fault, and it was averred that such killing was 'negligent, wrongful, and inexcusable.' The defendant could not admit these allegations and escape liability. As the petition was, in substance, sufficient, the overruling of the motion to dismiss it was not erroneous. See Rayford, *supra*. Under the rulings made in Blackstone, *supra*, and Russell, *supra*, the ground of special demurrer, to the effect that the petition failed to allege any specific act of negligence on the part of the defendant company, was meritorious, and the court erred in not dismissing the petition on this ground." Cited, 120/477, 479, 890; 122/699; 124/1053.

The allegations of a pleading are to be construed most strongly against the pleader when attacked by demurrer. The demurrer admits only the facts, and not the legal conclusions drawn therefrom by the pleader. *Brown v. Massachusetts Mills in Georgia*, 7 G. A. 642; *Harris*, 129/388.

In *Ayers*, 5 G. A. 454, Powell, J., said: "Pleadings are construed most strongly against the pleader. *Athens Mfg. Co. v. Rucker*, 80/291 (4 S. E. 885); *Smith*, 84/183, 186 (10 S. E. 602); *Augusta Stockyard Co.*, 115/70 (41 S. E. 598). And if the pleadings are capable of two constructions, the one most unfavorable to the pleader must obtain. *Evans v. Collier*, 79/315 (4 S. E. 264); *Augusta Stockyard Co.*, *supra*." Cited, 8 G. A. 325.

In *James*, 90/695, it was held that a declaration by a husband, alleging that the plaintiff's wife, being a passenger on one of defendant's cars, undertook to alight, and that while so doing and by reason of defendant's negligence the car suddenly started off, causing her to fall to the ground, "and thereby producing such serious bodily injuries to her as to deprive petitioner for a long time of her company and services, and entail upon him heavy expenses for nursing and medical attention, all to his damage" in the sum of \$1,000, sets forth substantially a cause of action, and, though wanting in sufficient fullness and detail as to the manner in which the injury was caused, and its consequences, of which advantage could be taken by special demurrer at the first term, should not, at the trial term, be dismissed on defendant's motion, made on the ground that the allegations as to the nature and extent of the injuries done plaintiff's wife were too vague, uncertain, and indefinite to put defendant on notice as to the nature of the case to be proved. *Lumpkin*,

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J., said: "Under § 5538 (4960) of the Code, every declaration shall plainly, fully, and distinctly set forth the cause of action, and this should be done in order that the defendant may without difficulty understand the nature of the plaintiff's charge or demand, and make preparation to meet it. For want of sufficiency in the respects indicated a demurrer will lie, which should be sustained unless the plaintiff, by proper amendment, cures the defects in his declaration. Where no cause of action whatever is set forth, the defendant may move at any term to dismiss the action, because upon a declaration totally defective in substance a motion in arrest of judgment would be good. Whenever this is true, the plaintiff's case may be cut off summarily at any term, and thus save the unnecessary consumption of time in going through a trial which could not result in any valid judgment; but defects merely of form should be taken advantage of at the first term. Rule 28 of the superior court. Where a legal cause of action is set forth, formal defects would be cured by verdict." Cited, 122/563.

While, under § 5104 (4558) of the Code, the defendant in an attachment case may appear and defend at any time before final judgment, all defenses must be submitted and disposed of in their proper order; and consequently such defendant can not, after pleading to the merits, and a term has passed, interpose and have adjudicated special demurrers to the plaintiff's declaration, relating only to matters of form, and not vital to the plaintiff's cause of action. Lumpkin, J., said: "It is well settled, in Georgia practice, that in actions either at law or in equity a motion to dismiss, based upon the ground that the declaration or petition fails to state a cause of action, may be entertained even at the trial term. As to defects of form, we understand it now is, and has ever been, the rule that advantage of them must be taken by special demurrer at the first term." Mitchell, 95/78. Cited, 101/730; 122/562; 130/421.

The court at the trial may dismiss a petition, if so defective that after verdict a motion in arrest of judgment would be sustained, but it can not consider special demurrers not filed at the appearance term. Brown, 119/88.

A declaration for a tort will not be dismissed on motion at the trial term because of uncertainty in setting forth the date of the commission of the tort, or because some of the personal injuries complained of are not fully described. Such defects are matter for special demurrer. Powell, 89/601.

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Where a petition contains several paragraphs, some of which set forth and pray for damages which may be properly said to have arisen from the wrongs complained of, a demurrer alleging in general terms that "said items of damage are too remote, and can not be recovered," is not good. If any of such items are too remote to constitute the basis of a recovery, the same should be specially pointed out. *Seals*, 102/817. Cited, 120/286.

Where there is no special demurrer to a declaration it is not error to refuse to strike from the latter certain words, as not relevant either in matter of form or substance, the motion to strike being made orally at the trial. *Glover*, 92/132.

In *Wilson*, 132/215, plaintiff alleged that in endeavoring to save her house from a fire that had been negligently caused by the defendant her clothing caught on fire and she was injured. The sixth paragraph of the petition alleges, that "petitioner has been unable to perform any labor in support of herself and three small children, her lost time now amounting to one month," etc. Demurring specially to the sixth paragraph, defendant "says that the allegations in the same as to the plaintiff's three small children are irrelevant to the issue made by the petition, and the plaintiff is not entitled to recover any damages on account of the same, and the same are insufficient in law." It was held that the allegation in the sixth paragraph of the petition, relative to the plaintiff's "three small children," was properly stricken upon demurrer, as being irrelevant to the issues involved in the case.

While the averment of facts contained in independent counts of a declaration may not be taken in aid the one of the other, yet if the pleader, by appropriate averment in one count, adopts as a part of such count facts stated in another, such facts so adopted may be taken as stated in the former, without formal repetition; and even though the latter count be insufficient in statement of a cause of action, if the former, so aided, states a cause of action, a demurrer thereto for want of a cause of action should be overruled. *Hutson v. King*, 95/271.

A separate count in a petition claiming damages for negligence, which alleged in general terms that the defendant was guilty of negligence, should have been stricken on special demurrer setting up that it failed to set forth the particulars in which the defendant was negligent, unless the defect therein was cured by amendment. *Gardner*, 122/82; *Russell*, 119/705. Cited, 119/844; 122/563; 129/842.

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A petition claiming damages for negligence, which contains only general allegations of negligence, will be dismissed on special demurrer, unless so amended as to set forth one or more specific acts of negligence. It follows from the foregoing that when a petition sets forth general allegations of negligence, which are followed by an averment of a specific act of negligence, there can be no recovery by the plaintiff unless the specific act of negligence is established to the satisfaction of the jury. In a suit of the character above indicated, evidence of the circumstances attending the transaction which resulted in the injury, and constituting the *res gestæ* of the occurrence, may be properly admitted, although such evidence may show other acts of negligence on the part of the defendant than the one alleged. But such evidence will not authorize a recovery unless the specific act of negligence alleged is established to the satisfaction of the jury. *Palmer Brick Company v. Chenall* 119/837. Cited, 122/698; 7 G. A. 586.

In *Kemp*, 122/559, the petition alleged, that the defendant by the running of its locomotive cars, and machinery in a careless, negligent, and improper manner, ran over and killed the plaintiff's husband between Parish station and Metter station in Bulloch county; that the killing was done by a passenger-train going west upon a straight track; "that heretofore in the county aforesaid, the defendant by its carelessness, negligence, and improper conduct, and by the carelessness, negligence and improper conduct of its officers, agents, servants, and employees in the running and operating of its locomotives, cars, and machinery, on or about February 12, 1902, recklessly and wantonly ran over, mangled, crushed, and killed B. J. Kemp, the husband of petitioner." The defendant demurred on the ground that the petition stated no cause of action and did not make it to appear that there was any duty of diligence on the part of the defendant to the deceased. It specially demurred on the grounds, that the plaintiff's cause of action was not set forth fully, plainly, and distinctly; that it was not alleged how or in what manner the injury was inflicted; that it did not appear from the petition that there was any duty of diligence on the part of the defendant; and that it did not appear that the deceased was free from fault. The court overruled the demurrer. The case was submitted to the jury, and at the conclusion of the plaintiff's evidence the court granted a nonsuit. Lamar, J., said: "The allegations in the petition were of the most general nature, and, beyond

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the fact of homicide, gave the defendant little or no indication of what was expected to be proved. The petition did not show whether the deceased was an employee, licensee, or trespasser. Each of these relations raised a particular duty. What might have been negligence as to one would not necessarily have been so as to the other. The petition did not show whether the homicide was at a crossing, at a point distant therefrom, or at a place where the defendant was bound to be on the lookout for pedestrians. It did not allege whether the plaintiff was walking, standing or lying on the track; and if the latter, whether he was there voluntarily or because of some sudden access of sickness. Except inferentially, it is not charged that the employees saw him or could have seen him, or that they knew of his danger and realized that he could not avoid the danger by stepping from the track to a place of safety. Such evidence as was finally admitted shows that these allegations were material. But the defendant was entitled to information on those subjects before the trial began. In some jurisdictions the petition would have been held to be bad in substance, and for that reason subject to a general demurrer on the ground that "it did not state facts sufficient to constitute a cause of action." Under our liberal system of pleading, there being enough to amend by, the incomplete and partial statement of facts would be treated as a defect in form rather than as a defect in substance. For that reason it was good as against a motion to dismiss on general demurrer. It by no means follows, however, that the defendant, over its objections, could be forced to trial under pleadings which did not give notice of the breach of duty and acts of negligence for which it was sought to be made liable. * * * And since the defendant can no more deal in generalities than can the plaintiff, where there is a defective cause of action stated he must point out the defects of which he complains. But when by special demurrer he does so, and stands upon his statutory right, he is entitled to have the omissions supplied. He is entitled not only to a plain, distinct statement of the plaintiff's charge, but also to a full statement of the plaintiff's "ground of complaint." Code, § 4598 (4960). * * * In view of the liberality in holding defective petitions good as against a motion to dismiss, and the most unlimited right to amend, but with a recognition at the same time of the defendant's right to a full statement, there has been a marked tendency in our decisions to magnify the office and the importance of the

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special demurrer. And when the defendant calls therefor, he is entitled to a full statement of time, place, circumstance, and facts the plaintiff expects to prove, so that he may prepare his defense accordingly—whether that defense be by demurrer or by plea raising an issue to be passed on by the jury. He is entitled to a statement of issuable and traversable facts; not to general allegations of negligence or liability, which, at last, are more in the nature of conclusions than allegations of fact. The petition here, though good as against a general demurrer, was defective. The omissions were duly pointed out by special demurrer, which should have been sustained.” It was held that the more liberal the law in the allowance of amendments, and the less the necessity of formalities in pleading, the greater the right of the defendant by special demurrer to call for a full statement of the facts out of which the plaintiff’s cause of action arises. While the petition was good as against a general demurrer, it did not make the full statement required by the Code, § 5538 (4960) nor did it put the defendant upon notice of what was intended to be proved; and the special demurrer should have been sustained. Cited, 127/124; 129/115; 1 G. A. 718; 135/637. See this case again, 129/115.

Where the petition is indefinite as to material allegations, and attention is called to the defect by a timely and appropriate special demurrer, which is overruled by the court, and defendant duly excepts, in the absence of an amendment curing the defect this court has no alternative but to reverse the judgment. *Cagle v. Shepard*, 1 G. A. 192. Cited, 3 G. A. 4.

The defendant company had the right to be put on notice of the specific acts of negligence by reason of which it was charged that the plaintiff had been damaged. But a suit in a justice’s court which in general terms alleged negligence was good against an oral demurrer made after trial before the justice and at the trial upon an appeal to a jury in the justice’s court. *Knight*, 122/290. Cited, 123/332.

In *Pope*, 129/842, it was held that, in an action based upon the negligence of the defendant, which it is alleged resulted in the killing of a mule, it is not sufficient to allege the negligence in general terms; and it was error for the court to overrule a special demurrer calling for the particulars of the alleged negligence. *Russell*, 119/705; *Stewart*, 120/890; *Atkinson, J.*, specially concurring.

In an action founded upon negligence, mere general averments

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of negligence are sufficient as against a general demurrer; but when a special demurrer is filed raising the objection that the allegations are too general, the particulars of the negligence must be set forth. A plaintiff in an action founded upon negligence is confined to proof of the acts of negligence alleged in his petition, or which constitute the *res gestæ*. A specification of the particulars of the negligence relied on can not be avoided by an allegation that the plaintiff has been unable to ascertain the particular acts of negligence causing the injury, and that on account of the manner in which the injury was inflicted they were more peculiarly within the knowledge of the defendant than of the plaintiff. General averments of negligence can not be aided by the maxim *res ipsa loquitur*. This maxim can not be invoked to aid a defective pleading. *Hudgins v. Coca Cola Bottling Co.*, 122/695. Cited, 124/124, 1053; 129/370; 5 G. A. 793.

In *Ryals*, 123/330, it was held that in a suit brought in a county court against a railway company for the negligent killing of stock, where the declaration alleged in general terms "that said damage was done by the running of the locomotive and cars of said defendant in said county in a careless and negligent manner by said defendant's employees," it was subject to a special demurrer on the ground that it failed to specify wherein the defendant was negligent, or to put it on notice of the tort complained of; and, in the absence of amendment, the declaration should have been dismissed. *Lumpkin, J.*, said: "Section 2780 (2321) of the Code, under which, upon proof of injury from the operation of its locomotives, cars, or other machinery, a presumption of negligence arises against the railroad company, states a rule of evidence, and does not dispense with proper pleadings." Cited, 3 G. A. 273, 346.

A petition to recover damages for the killing of two mules by a railroad company, which in general terms alleged that the animals were killed by a train of defendant, "in a careless and negligent manner, running over said mules in the field of petitioner * * * and on the tracks of said railroad company," should, in the absence of amendment, have been dismissed upon special demurrer, on the ground that it did not set out any specific acts of negligence. *Stewart*, 120/890. Cited, 123/331; 129/842.

In *Smith*, 3 G. A. 1, it was held that the court erred in overruling the special demurrer to one of the counts in the petition. A general verdict can not be sustained when there are two counts in the peti-

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tion, one good and one bad, and the court has erroneously, over protest by demurrer, submitted the bad count as well as the good one to the consideration of the jury. An erroneous refusal to sustain a valid special demurrer vitiates the trial. Powell, J., said: "The plaintiff alleged, that her son was a passenger on defendant's train from Savannah to Claxton; that he was drunk and asleep when he reached Claxton, and was carried to Collins; that at Collins the conductor and the porter took her son, who was so drunk that he could not take care of himself, to the rear end of the rear coach of a long excursion train, there put him off in his drunk and helpless condition at night, some distance from the station, on or near the track of the defendant, left him there without calling any body's attention; and [he], in said drunken and helpless condition, wandered off down the track of the defendant, towards the town of Manassas, when between the 57th and 58th mile posts on said railway of defendant said Hamp Smith * * * was run over and killed by another train of the defendant.' To the petition as amended the defendant demurred generally; and to the allegation just quoted, specially, because it is too vague and indefinite and not sufficient, in that the distance from the 57th and 58th mile posts, where the homicide is alleged to have occurred, to Collins does not appear; also that it does not appear how far this place was from Claxton. * * * If to meet this demurrer the plaintiff had amended by alleging the truth, as it finally appeared, that the distance from Collins where the deceased was put off the train to the point where he was run over by the second train and killed was between three and four miles, the second count should have been stricken on the ground that no cause of action was therein set out." Cited, 3 G. A. 175.

A petition which does not aver a time, as to every material or traversable allegation, is subject to special demurrer pointing out the defect. *Mandeville Mills v. Dale*, 2 G. A. 607. Cited, 2 G. A. 767; 6 G. A. 100. To the same effect, *Jarrell v. American Pipe Bending Machine Co.*, 2 G. A. 764.

In a suit by an employee against his master, a railroad company, for damages, the petition alleged that while the plaintiff was engaged in the performance of his duties as a brakeman on top of the car of a freight-train of the defendant, running between stations, he was thrown therefrom "while said train was being run at a very high, negligent, and dangerous rate of speed," and that the

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plaintiff was injured by the defendant "in the negligent running of its cars at said time and place," and that the train at the time of the injury was running about 50 miles an hour. Held, the petition was not subject to demurrer on the ground that it did not allege "in what respect the running of defendant's cars at said time and place was negligent," or on the ground that the allegation "that said train was being run at a very high, negligent, and dangerous rate of speed is the mere conclusion of a pleader." (Fish, C. J., and Beck, J., dissent.) Where the petition further alleged, "That while he was standing on the top of said [car] in said train, about the middle of the car longitudinally, upon a board upon the top of said car known as a running-board, the same being placed upon said car for the use of employees whose duties require them to ride upon the top of said cars, the car, without any notice to him whatever, suddenly gave a violent, unusual, and unnecessary jerk or lurch, by reason of which he was thrown to the ground as aforesaid—so great and violent was the jerk or lurch to said car that he was thrown half the distance of the width of said car and entirely off the same upon the ground as aforesaid, * * * that he was thrown from said car by the violent, unusual, and unnecessary motion of said car, and it is impossible to say whether it was a jerk or lurch of same," in view of all of the allegations in the petition, it was not subject to demurrer on the ground that these allegations were in the alternative and did not show or allege "whether the said injuries were caused by a jerk of the car or by a lurch of the same." The petition alleged, "That, at the time he was thrown from said car as aforesaid, he was at the place on said car where he was required by the conductor, the agent of said company in charge of said train, to be, and at the place where he was required by the rules of said company to be; that he was at that time acting under immediate orders of his superior officer, the said conductor in charge of said train as aforesaid, which officer he was required by the rules of said company to obey." Held: (a) Such allegations were not subject to demurrer on the ground that the rules therein referred to were not set forth. (b) Such allegations, in view of the allegations quoted in subdivision (b) of the first headnote, stating where the plaintiff was on the car when thrown therefrom, were not subject to demurrer on the ground that they did not set forth "at what place on the car the petitioner was required to be, nor where, by the rules of the defendant, the petitioner was required to be." Bell, 133/92.

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A petition alleged, in substance, the following facts: The plaintiff, a woman, purchased a through ticket between two points on connecting lines of two railway companies. She was transported by the first railroad to a junction point on the two lines. At that place passengers had to wait for a transfer to connecting trains, and there was no place at such point where they could obtain accommodations. In view of these facts the two companies jointly provided and used a waiting-room for such passengers; and upon her arrival there plaintiff was told by the agents and employees of both companies to enter the waiting room, which she did accordingly. It was necessary to wait several hours for the connecting train. While so waiting, the employee in charge of the waiting-room refused to allow her to remain until the connecting train arrived, ordered and forced her to leave the waiting-room at night and in the dark, with her husband and two children who accompanied her, and closed and locked the room. She was thereby exposed to a rainstorm and made sick, and was caused pain and suffering. Held, that, as against a general demurrer, the petition set out a cause of action in tort against the two defendants. Where plaintiff alleged generally that she purchased a ticket over both railroads between two points, by special demurrer she could be required to allege whether she purchased it from one company or the other, or its agents, or from an outsider. The description of the person who forced the plaintiff to leave the waiting-room as "the employee in charge of said waiting-room" was subject to special demurrer for not alleging whether he was claimed to be the employee of the one or the other defendant, or of both. An allegation that the plaintiff had to wait "several hours" for a train was subject to special demurrer, where no reason appeared why the plaintiff could not allege more definitely the time. Under the facts of this case, the sustaining of the general demurrers is reversed; the sustaining of the special grounds of demurrer indicated herein is affirmed; but direction is given that the plaintiff be given reasonable opportunity to meet such grounds, before the case shall be dismissed. *Riley*, 133/413.

The petition was good as against the general demurrer; and since, as amended, it set up the cause of action with sufficient fullness and certainty to enable the defendant to understand definitely the exact nature of the transaction alleged and of the liability asserted, it was not erroneous to overrule the special demurrers. *Johnson*,

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1 G. A. 441. See *Atlanta Ice & Coal Co. v. Barnes*, 1 G. A. 802, in which general and special demurrers were overruled.

In *Weathers*, 120/475, the petition charged that the defendant "was negligent in the running of its train [by which the mule was struck], and that the engine pulling said train did not have up a headlight, and that it was so dark that one was necessary." The particular train by which it was alleged the mule was struck was set out in the petition, and the injuries to the mule were described. The defendant demurred generally and specially, the general demurrer setting up that the petition failed to allege any specific acts of omission on the part of the company or its agents that would constitute negligence and authorize a recovery. To meet this demurrer the plaintiff amended his petition by alleging that the track or roadbed of the defendant at the point where the injury occurred was very nearly straight for a distance of about 400 yards south of the trestle where the mule was injured; that if the company had had a headlight on the engine at the time of the injury, its servants would have seen the mule before running upon it, and could have stopped the train in time to have avoided the injury. It was charged that the running of the train at the time in question without a headlight was negligence on the part of the defendant company, and that as a result of this negligence the mule was not seen and was run over and injured. It was held that the petition was good as against a general demurrer; and as amended it fully met the objections raised by the special demurrer. *Distinguished*, 124/1053; 122/85. Cited, 121/784; 120/890; 129/370.

Although the negligence with which a defendant is charged may be characterized in the plaintiff's petition as wilful and wanton, if the specific facts alleged do not warrant such conclusion the rule of duty which merely requires the exercise of ordinary care and diligence is not affected thereby; nor does it in such a case become incumbent upon the plaintiff, by reason of such allegation, to prove more than is required by law to entitle him to recover. The legal conclusions of the court are to be drawn from the statements of fact contained in the pleadings, unaffected by the conclusions of the pleader. *Shigg*, 117/454 (43 S. E. 706); *Moore*, 5 G. A. 562 (63 S. E. 642); *Western Union Telegraph Co. v. Harris*, 6 G. A. 260.

Neither a paragraph in a petition nor an allegation therein which

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constitutes only a portion of a paragraph should, on special demurrer, be stricken for defects not specified by the demurrer. *Cowart*, 5 G. A. 664.

In *Hubbard*, 131/666, Fish, C. J., said: "The judgment sustaining the demurrer contained the recital, 'It being conceded that the wire in question was erected by a telephone company to be used in its business,' and counsel for plaintiff in error argued the case before this court as if the statement in such recital were a fact to be considered in reviewing the judgment on the demurrer; but as the office of the demurrer was to test the legal sufficiency of the petition upon the facts as they were therein alleged, its scope could not by an agreement or concession, which neither amended nor purported to amend the petition, be extended to cover questions not raised by the allegations of the petition. *Constitution Publishing Co. v. Stegall*, 97/405 (24 S. E. 33); *Shuler v. State*, 125/778-783 (54 S. E. 689), and cases cited."

After a trial judge has formally overruled a demurrer to a petition, holding that upon the facts stated in the petition the defendant is liable in damages to the plaintiff, it is not within the power of the judge, at a subsequent term of the court, to review or revise such ruling; and if no exception thereto be taken by the defendant, but it stands unreversed when the case is ripe for a trial on the merits, the trial judge should not, in his charge to the jury, give to the defendant the benefit of the defense set up in the demurrer, since the questions thereby raised are *res adjudicata*, and the court can not by indirection deprive the plaintiff of the estoppel he is entitled to urge as against the defendant. *Sims*, 123/643. Cited, 127/124.

521. When a demurrer should be sustained.

If the court can not say, as a matter of law, that the facts alleged in the declaration do not constitute negligence on the part of the defendant, the case is for submission to the jury, and the demurrer should be overruled. *Wood*, 84/363.

A general motion to dismiss a suit "because it is a suit for a tort by a married woman living with her husband, in her own name alone," was properly overruled, where the petition set out a cause of action against the defendant and prayed for certain elements of damage for which the plaintiff could recover, although it may also have contained prayers for other elements of damage for which the

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plaintiff had no right to sue. A general demurrer should not prevail where any part of the petition is good. *Mayor v. Smith*, 111/870.

When, in an action for damages against a railroad company, the allegations in the plaintiff's declaration would not entitle him to recover if established, and they show that he was guilty of gross negligence, a demurrer thereto should be sustained. *Richardson*, 80/727.

Questions of diligence and of negligence, including contributory negligence, address themselves peculiarly to the jury, and a court properly declines to solve them by decision on demurrer, except in plain, indisputable cases. *Southern Cotton Oil Co. v. Gladman*, 1 G. A. 259. Cited, 2 G. A. 315.

The averments of the petition presented issues relating to the negligence of the defendant and the diligence of the plaintiff, which were appropriate for determination by a jury, and it was not error to overrule a demurrer to the same. *Hood*, 127/206.

In *Martin*, 118/622, the petition alleged, that the defendant was a corporation operating a street-railroad for the transportation of passengers in the county in which the suit was brought, that on a specified day and hour he was a passenger on one of its cars; that on previous occasions he had been such passenger, and was in the habit, in order to reach his place of residence, of alighting from the cars at a point where the road was crossed by a designated street,—a habit known to the motorman in charge of the car at the time specified; that a custom exists with the defendant to merely put on brakes and slacken speed to allow male passengers to alight from the cars, unless the passenger insists on the car coming to a positive stop before leaving it, and there is no danger to a male passenger in stepping from a car under control in this manner; that at the time specified, the car on which plaintiff was a passenger reached the place designated, and he signaled, as had been his custom, to the motorman and conductor to slow up and let him get off the car, and the motorman and conductor recognized the signal and in response put on brakes, and the car slackened its speed until it was safe for him to step off, when, just as he was in the act of stepping from the running step along the side of the car, the motorman caused the car to give a sudden, unexpected, violent jerk, which threw him, with a twist of his body, prostrate to the ground, the force of the fall breaking his arm and causing

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other injuries described; that these injuries were received through the gross negligence of the defendant; and that he was thereby damaged in a sum specified. It was held that, where a petition shows the jurisdiction of the court, that the defendant was under a duty to the plaintiff, and the facts from which the duty arose, that there was a breach of the duty, and that plaintiff was damaged by such breach, the petition sets out a cause of action and is good as against a general demurrer.

It is the duty of the trial judge to pass on the sufficiency of the facts alleged in a petition to show a cause of action in the plaintiff's favor, when this question is raised by demurrer, although the case be one wherein the plaintiff seeks to recover damages alleged to have been sustained in consequence of the negligence of the defendant. *Hill*, 124/243. Cited, 130/451.

In *Mack*, 118/629, the petition alleged, that the plaintiff, a boy sixteen years of age, was a passenger on a passenger-train of the defendant, having gone aboard it to go to Stilson, a regular station at which all such trains stop, and at which this train should stop, and that "when the signal whistle for the station at Stilson blew, petitioner went to the door of the coach, and, as the train drew near the station, he went out on the platform to get off the train, but the train, through the fault and negligence of the defendant, did not stop as it should have done and was in duty bound to do, but ran past the station, petitioner standing on the platform, where he had gone without fault to get off the train at the station. When the train had run about one hundred and fifty yards past the station, the agents and employees of the defendant, without giving petitioner any warning, violently and suddenly applied the brakes to the train, causing an abrupt and instant break in the speed of the train, accompanied with a terrific shaking and jolting which threw petitioner from the platform to the ground," where he received physical injuries described; that he was injured by the negligence of the defendant, without fault or negligence on his part; and that by reason of the injuries mentioned he was damaged in a sum stated. The defendant demurred on the grounds, that the petition showed that the plaintiff was not entitled to recover; that, he was unnecessarily standing in a dangerous position, where under the rules of law and of all railroad companies, passengers are prohibited from riding, and that this showed a want of ordinary care on his part. It was held that as against a general demurrer, the petition set forth a cause of action. Cited, 6 G. A. 41.

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It was held in *Adams*, 129/688, that though a servant assumes the ordinary risks of his employment and is bound to exercise his own skill and diligence to protect himself, this assumption of risk, where the employment concerns the operation of a machine with a defective or dangerous appliance is subject to the limitation that the servant must not only have actual or imputable knowledge of the defective machinery, but also of the danger attendant upon its use, where such danger is not so obvious as to be apparent to a person in the exercise of ordinary care. With respect to such unassumed risks the master is under duty to warn the servant. *Evans*, P. J., said: "The chief dereliction of duty of the master, as alleged, consisted in his failure to warn the servant of the danger incident to her employment, which danger was latent in character, and unknown to the servant. The servant worked at the machine which killed her; but in avoidance of the possible inference from that fact of her knowledge of the machine, and the danger incident thereto, it was alleged that the rod attached to the lever was underneath the machine; that she did not know it was so attached; that the danger from the mechanism was not patent; that she did not know of the danger, and had not been warned as to the same. These allegations assign a sufficient reason why the servant did not apprehend the unknown peril associated with her employment. * * * This assumption of risk is subject to the limitation that the servant must know, or in the exercise of ordinary care should know, not only of the existence of the defect in the machinery, but of the danger attendant upon its use, where such danger is not so obvious as to be apparent to a person of ordinary intelligence. *Pitts*, 98/655 (27 S. E. 189). It was alleged that the single printing machine was unfit and dangerous on account of its pattern, and the long time it had been in use. There were two rods underneath it, one attached to the lever which started the machine, and the other connected with other parts of the machinery in such a way that it was not dangerous in handling during the cleaning process. But there lurked peril in the rod attached to the lever. The petition affirms the servant's ignorance of the danger, and that the peril was not so obvious as to be discernible by the use of ordinary diligence. Under such circumstances the master owed a duty to the servant to warn her of the hidden danger, and the servant, not knowing of the peril, and engaged in the work of cleaning the machine under the master's order,

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had a right to rely on the master to perform this duty. We are of the opinion that as against a general demurrer the declaration set forth a cause of action."

In Boyd, 5 G. A. 137, the petition, omitting formal and immaterial parts, is as follows: "2. That on the 17th day of September, 1906, plaintiff was a passenger on one of the regular passenger-trains of the said defendant, which train was traveling over the defendant's line of road in the state of South Carolina. 3. That plaintiff had purchased a ticket to Woodlawn, South Carolina, which is a station at which the said train upon which plaintiff was traveling was regularly scheduled to stop for the reception and discharge of passengers. 4. That as said train approached the said station, and was apparently slowing down to stop at said station, and was traveling at a slow rate of speed, not exceeding four or five miles an hour, plaintiff went out upon the platform preparatory to alighting at the said station. 5. That when plaintiff was so situated, the agents and servants of the said defendant in charge of the movements of the train caused the said train, without warning and with a sudden, violent, unexpected and negligent jerk, to quicken its speed. 6. That plaintiff, by reason of said jerk, was thrown heavily to the ground. 7. That as a result of said fall, plaintiff's ankle was shattered [and certain enumerated injuries ensued]. 8. That in matters and things herein related, plaintiff was in the exercise of all reasonable care and diligence and was free from fault. 9. That the said fall was due wholly to the defendant's negligence." Besides a general demurrer, the following special demurrers were urged by the defendant: To paragraph 3, because plaintiff fails to aver the place where he purchased a ticket over the defendant's road, and where and when he became a passenger on defendant's train. To paragraph 4, because plaintiff fails to state his position on the train before he went out upon the platform; also because he fails to aver any sufficient reason for riding on the platform; also fails to aver the character of the platform, whether it had a railing around it or not; also fails to aver his exact position on the car; also because he fails to aver how far the train was from the station when he went out on the platform. To paragraph 5, because plaintiff fails to aver whether or not the train stopped at Woodlawn station. To paragraph 6, because plaintiff fails to aver how far the train was from the station when he was thrown to the ground. Because the allegations of paragraph 7 are too un-

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certain for plaintiff to deny or traverse the same. To paragraph 8, because it alleges a conclusion, and not the facts upon which it is based. To paragraph 9, because plaintiff fails to allege wherein the negligence of this defendant consisted. Powell, J., said: "The demurrers aimed at paragraph 4 of the petition are none of them well taken except the one that alleges a failure to aver how far the train was from the station. Under several decisions of the Supreme Court in similar cases, this is a very material point. There is no merit in the demurrer to the 5th paragraph. The demurrer to the 6th paragraph is well taken. The critic is itself chargeable with imperfections, so far as it attempts to challenge the sufficiency of paragraph 7, and was therefore properly overruled. The demurrer to the 8th paragraph is not well taken. Most important of all, the demurrer to the 9th paragraph is well taken. This paragraph contains a mere general allegation of negligence. If the petition had charged that the jerk alleged in the 5th paragraph was unusual and unnecessary, the general allegation of the 9th paragraph, taken in connection therewith, would be held to be sufficient; but no such allegation appears anywhere in the petition. Lyle, 4 G. A. 113 (60 S. E. 1075). For the failure to sustain such of the special demurrers as are herein stated to be meritorious, the judgment is reversed."

Reasonable certainty is all that is necessary to render pleadings exempt from attack by special demurrer. Powell, J., said: "Mere conclusions will not suffice as allegations of negligence. However, structural descriptions of defects alleged in machinery are not required in order to give the necessary certainty. To state specific concrete improper results which a machine in question produced is often sufficient to describe a defect definitely. In other words, to say that a locomotive smoke-stack was so insufficiently constructed that it allowed live sparks of fire to come through describes with legal definiteness a lack in its construction. An examination of the record upon which the fifth headnote in the case of *Green v. Babcock Co.*, 130/470 (60 S. E. 1062), is based shows that the Supreme Court recognizes and applies this principle. See also *Reeves*, 123/697 (51 S. E. 610)." *Davis & Brandon*, 5 G. A. 214. Cited, 5 G. A. 226; 7 G. A. 231.

In *Hubbard*, 5 G. A. 223, Powell, J., said: "Even in pleading it is not necessary that the negligent deficiency be described in structural terms; a deficiency may be sufficiently alleged by stating that

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the particular contrivance was so constructed or maintained that it gave forth a result which it was designed to prevent, and which such contrivances, as they are usually constructed and maintained, do prevent." Citing *Davis & Brandon* and *Reeves Cases*. Cited, 7 G. A. 231.

A defect in a machine may be described by showing that the machine was in such condition that it produced certain definitely described results which a machine not defective would not and should not produce. It is not necessary to describe minutely or particularly the physical appearance of the parts alleged to be defective. *Davis*, 5 G. A. 214, 216 (62 S. E. 1022), and cases cited; *Hubbard*, 5 G. A. 223, 226 (62 S. E. 1018); *Attaway*, 7 G. A. 231.

In *Rayford*, 115/937, *Fish, J.*, said: "The allegations of the petition, material to the consideration of the attack made upon it, are, that the petitioner and several other laborers, all in the employment of the defendant company, and under the charge and direct supervision of one *Asbury*, an agent of the defendant, were engaged in moving certain steel rails from one car to another; that *Asbury* pointed out a certain rail, and directed petitioner to assist in moving it; that petitioner complied with such direction, and when the rail was lifted, the moving of it caused one of the other rails in the pile to roll down on the petitioner's foot, crushing it, causing him great pain and rendering him unable to work for several months; that his injuries were due to no negligence or carelessness on his part, but were caused by the carelessness and recklessness of *Asbury*; that "*Asbury* by exercising the slightest care or caution could have seen that it was dangerous for petitioner to lift the rail as ordered, and * * * he could have prevented petitioner from getting injured, but * * * it was impossible for petitioner to see, from his position, that it was not safe to obey the order given him." The contentions of the plaintiff in error are, that the petition shows the work which petitioner was directed to perform was such as the most ordinary intelligence could comprehend; that one man, as well as another, could see the danger of disturbing the equilibrium of the pile of rails by moving one of them; that if the foreman by the slightest care or caution could have seen that it was dangerous for petitioner to lift the rail, the petitioner could certainly have done likewise, and if he could not, he should have plainly and distinctly alleged sufficient reason to excuse himself for not knowing what could be so easily seen; that the general statement that pe-

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tioner could not see the danger "from his position" was not sufficient; and that the sufficiency of the petition should not be determined by an isolated allegation, but all parts should be construed together. The answer to these contentions is, that the petition alleged "it was impossible for petitioner to see, from his position, that it was not safe to obey the order given him." This allegation, though general, surely assigned a sufficient reason in substance why the petitioner could not comprehend the danger which was so apparent to the foreman. The general demurrer went to the substance only of the petition, making the point that the petition was essentially insufficient in law, and not that it was merely formally defective. If the railroad company desired more specific information as to the position of the petitioner when he was injured, and the reasons in detail why, from his position, he could not see the danger, it should have specially demurred. The petition, we think, was sufficient in substance, the test of this being whether the defendant could admit all that was alleged and escape liability." Cited, 120/231; 122/563; 129/691; 1 G. A. 109; 2 G. A. 554. To the same effect, *Richards v. O'Brien Bros.*, 1 G. A. 107.

The petition of Smith against the Southern Pine Company of Georgia, 113/629, alleged that he was the owner of 300 acres of lot of land number 368 in Coffee county, and that the defendant had damaged him in the sum of \$500, by reason of the facts hereinafter set forth: The defendant owns and operates a saw-mill at the town of Hazelhurst, and for the purpose of furnishing it with logs and timber, owns and operates a railroad, which passes through the plaintiff's land above mentioned, and on which are used locomotives which are common wood-burners and are fired with wood; and the defendant, while running one of these locomotives through the plaintiff's land, on June 12, 1898, negligently threw fire in the grass and other combustibles on its right of way, which fire spread all over the plaintiff's 300 acres, destroying the vegetation and pine timber on it, to his damage as above stated. The land was suitable for farming and grazing purposes, and by reason of the fire the plaintiff was placed at great disadvantage for timber with which to fence his land for farming purposes, and it was rendered almost worthless for grazing purposes. The defendant was guilty of gross negligence in allowing dry or dead grass, straw, leaves, and other things of combustible nature to accumulate and remain on its right of way, and in scattering sparks or other fire from its locomotive in the

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grass, etc., on the day above mentioned. It was guilty of gross negligence in using defective machinery in propelling its trains, and in running its locomotives without proper spark-arresters, and otherwise in bad condition, so that sparks and fire were easily thrown or scattered into the woods lining its roadbed; also in making no effort to extinguish the fire after it was set out, and in letting it do whatsoever damage it might. Plaintiff did not contribute to the injury. He prayed judgment for the actual damage, and for punitive damages. The defendant demurred on the grounds, that no cause of action was set out; that so much of the petition as seeks to describe the number of acres owned by the plaintiff is defective in not stating what portion of the lot mentioned is owned by him; that he fails to state on what date the fire occurred; that he fails to itemize or give particulars as to the damage done to the vegetation, timber, etc., so that the defendant would be put on notice of the respective claims of damage relied on; and that the allegation as to negligence in failing to extinguish the fire is too general. The plaintiff amended the petition as follows: By reason of the several acts of tort enumerated in the original petition, in communicating the fire to the premises described, the defendant has damaged plaintiff in the sum of \$250 or other large sum, for the fire having burned and otherwise damaged and destroyed the pine timber on the 300 acres; and further damaged him and his premises for grazing purposes in the sum of \$100 or other large sum, by reason of the fire having burned up and killed the grass, herbage, vegetation, and undergrowth on the 300 acres; and further damaged him and his premises for farming purposes in the sum of \$150 or other large sum; aggregating \$500 or other large sum, damage to him and his realty, freehold, and premises by the fire. The 300 acres described are all of lot of land 368 in the first district of Coffee county except 190 acres on the north side of said lot. The allegation that on June 12, 1898, fire was negligently thrown in the grass, etc., was amended by adding that it then and there caught, blazed, burned and immediately spread and directly communicated and burned all over the plaintiff's lands, with the result in damage as complained of in the original petition and in the amendment. It was held that the petition as amended set forth a cause of action, and alleged with sufficiency of detail the ground thereof.

It was alleged that while plaintiff's son was crossing the railroad track the defendant's fireman negligently and wantonly threw at him,

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causing him to fall on the track in close proximity to defendant's engine, so that by the exercise of ordinary care he could not have avoided being run over, and that the engine was not stopped by the engineer and fireman, but was ruthlessly run by them over plaintiff's son, and caused him to sustain injuries from which he died the following day. It was not erroneous to overrule a ground of special demurrer which complained that the petition failed to allege what missile or object was thrown at the deceased, and failed to set out the facts on which the plaintiff based the opinion that the fireman's so throwing at her son caused him to fall on the track. McDonald, 135/635.

In a suit against a railroad company for damages, a general allegation that the plaintiff "was put to a reasonable expense of \$150 for necessary medical attention and nursing," was subject to special demurrer. Barnwell, 131/792 (4) (63 S. E. 501). If there were no other error, the overruling of a special demurrer to such an allegation would not require a reversal of a judgment of recovery by the plaintiff, where no evidence was introduced in support of such allegation, and where the charge of the court did not submit any such element of damages to the jury, and it is apparent that no harm could have resulted to the defendant from the ruling. Bradford, 135/522.

A paragraph of the plaintiff's petition alleging in general terms that "on account of said injuries, petitioner's medical bill, loss of time, and nurse's attention has caused, and is well worth, the sum of \$150, and he will continue to have medical attention for a long time to come," was subject to special demurrer upon the ground that "there is no itemized bill or bill of particulars of the medical bill, loss of time, or nurse's attention sued for." Turley, 127/594.

An allegation that by reason of the injury received the plaintiff "has had to pay for physician's bill and nurse and medicine \$55 or other large sum," is subject to special demurrer on the ground that it does not specify how much the plaintiff has had to pay for physician's bills or how much for nursing or how much for medicines, and with whom the plaintiff has had to expend said amounts. Where such information is called for by special demurrer, it is the duty of the plaintiff to give it with such substantial fullness and specification as the facts and nature of the case reasonably admit of, though unnecessarily minute and detailed statements are not required. Turley, *supra*; Bradstreet Co. v. Oswald, 96/396 (23 S. E. 423). Fon-

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taine v. Baxley, 90/416 (17 S. E. 1015) ; *Russell v. Giblin*, 8 N. Y. St. 336. *Barnwell*, 131/791. Cited, 135/522.

In *Powell*, 127/805 the plaintiff alleged that the car in which she was transported was not heated and in consequence of the failure to heat the car she was injured, and it was held that the petition failing to show whether the plaintiff was a passenger upon a freight or passenger train, the defendant was entitled, upon special demurrer to this portion of the petition, to have information in regard to that particular feature of the case. An allegation that "the attention of the agent of the company was called to the condition of the car, and requests made to have the same heated," was open to special demurrer on the ground that this allegation "fails to show what agent of the company had his attention called to the condition of the car, and whether said agent was connected with the operation of the train or had anything to do therewith." The defendant was entitled to more specific information than was contained in the allegation quoted; and the plaintiff should have shown, in the event she could not be more specific, whether or not the agent referred to was in any way connected with the operation of the train.

In *Pierce*, 122/665, it was held that a petition by a widow against a railroad company for the homicide of her husband, who had been an employee of the defendant, which set forth the time when, the place at which, and the circumstances under which the homicide occurred, and alleged that it was the result of the negligence of the officers, agents, and servants of the defendant, was not subject to a special demurrer raising the objection that the names of such officers, agents, and servants were not set forth in the petition. *Cobb, J.*, said: "In a case like the present, the negligent acts of the officers, servants, and agents of the company and the time and place of their commission are all that is necessary to put the defendant on notice of what it is to meet with respect to this matter. An employer has greater facilities for ascertaining the names of his employees than one who is injured by the negligence of such employees; and especially is this true where the injured employee and the negligent employees are engaged in different departments of work; as well as in the case of a widow of a deceased employee, who is the plaintiff in a suit brought for his homicide. While a railroad company operating a long line of railroad has necessarily numerous employees, and often the principal officers do not know the names of all such employees, the facilities which they have for obtaining information is

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greater than that which a stranger, or even an employee, would have. And where the time, place, and all the circumstances of the catastrophe which brought about the injury or homicide are alleged with great particularity, it should be an easy matter for the railroad company to ascertain the names of the employees who were responsible if responsibility existed, or who were blameless if the charge was unfounded. It is certainly easier for it to obtain this information than it would be for the widow of the deceased employee. In *Andrews, supra*, the question was raised by a special demurrer." Cited, 123/331; 2 G. A. 314.

In *General Supply & Construction Co. v. Lawton*, 131/375 it was held that the plaintiff having alleged in his petition that while passing under a scaffolding he received certain injuries because of certain defects in the scaffolding which caused it to fall upon him, and that he was, at the time of receiving the injuries, passing under the scaffolding "by the direction of the agent or foreman of the defendant company," the petition was demurrable upon the ground "that the name of such agent or foreman was not given, and that the petition fails to state whether the person by whose direction the plaintiff passed under the scaffolding, was agent or foreman, or to state what duties or services the alleged agent or foreman performed, so that it might appear whether such agent or foreman was acting as a fellow-servant of plaintiff or as vice-principal of the defendant." Where a demurrer is improperly overruled, and the case proceeds to trial, all that takes place in the trial subsequently to the overruling of the demurrer is nugatory. *Beck, J.*, said: "Had the plaintiff stated in his petition what "duties, services, or labor the alleged agent or foreman performed," so that the defendant would have been put upon notice as to whether such agent or foreman was acting as a fellow-servant of plaintiff or as vice-principal of the defendant, the mere failure to give the name of the person alleged to be agent or foreman would not of itself have been good ground for demurrer. *Pierce, supra; Ryals, supra.* But the failure both to state the name of the alleged agent or foreman, and to set forth what duties or services his position required of him, left the petition open to attack by special demurrer. The information called for by this special demurrer was of such a character that the defendant was entitled to have it given in the plaintiff's statement of his case in the declaration. It was material for the defendant to know, in preparing to meet the case made by the plaintiff in his pleadings, whether or not the plaintiff would insist

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that in passing under the scaffolding, by the falling of which the plaintiff was injured, 'by direction of the said agent or foreman,' the direction or order to pass under the scaffolding was given by one whose position and duties were of such a nature as to make him the vice-principal of the defendant, or whether he was a mere fellow-servant with the plaintiff himself."

While several of the acts of negligence set out in the petition failed to make a cause of action, the allegation that in making a coupling the engine backed at from ten to fifteen miles an hour, and, just before hitting the cab, suddenly and abruptly stopped, thereby causing the plaintiff to lose his balance and in the fall to receive the injury, set forth a cause of action good against the general demurrer. *Hairston*, 122/372.

The allegations of the plaintiff's petition showing clearly that he was at fault and could by the exercise of ordinary care have avoided the injury, the court did not err in dismissing the petition upon demurrer. *Abrams v. Mayor & Council of Waycross*, 114/712.

522. When negligence in several particulars is alleged.

Where a declaration set forth several particulars in respect to which it alleges negligence, the court in charging the jury may conform its instructions to those particulars on which the plaintiff insists at the trial and upon which, according to the evidence, the merits of the case depend, and may treat the others as not involved in the controversy. *Crawford*, 86/5.

In a case of this character, in which the plaintiff alleged several different acts of negligence on the part of the defendant, it was error to charge that if the jury found that the defendant was negligent in any of the particulars alleged by the plaintiff, the defendant would be liable provided the jury found that the plaintiff sustained injury. Under this charge the jury could have found for the plaintiff although they were of opinion that the negligence of which they believed the defendant guilty had not materially contributed to the injury of the plaintiff. In this respect, at least, the charge was erroneous. *Guilford*, 114/627. *Dis.*, 8 G. A. 194.

Where a plaintiff alleges a number of acts of negligence on the part of the defendant, it is not necessary to a recovery that proof should be made of each and all of such negligent acts, if the defendant's liability to respond in damages be shown by establishing the commission of one or more of the acts of negligence complained of. *Evans*, 121/391.

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Where the plaintiff seeks to recover on one or more of several theories of negligence, there is no error in refusing to give charges which, though sound as to one such theory, altogether exclude another on which a recovery might properly be based. *City of Columbus v. Anglin*, 120/785.

The judge having charged the jury that they should determine the questions at issue in the case by the evidence, it was not incumbent upon him to further instruct them that they should determine any particular one of the issues by the evidence, especially in the absence of a written request to do so. *Stewart v. Southern Bell Tel. & Tel. Co.*, 124/224.

The summary of the contentions of the parties must embrace every material issue made by the pleadings. Where a plaintiff bases his action upon two alleged acts of negligence by the defendant as causing the injury complained of, the omission by the court to state plaintiff's contention as to one of the alleged acts of negligence and to charge the law appropriate thereto is error. *Freeman*, 120/469.

The failure to give in charge a pertinent instruction not requested in writing will not require a new trial, where the general charge substantially covers the issues in the case. *Tate*, 129/526.

If the trial judge fully and correctly charges the law in regard to a particular issue, it will not furnish any ground of reversal that he did not charge on that subject in the language of the written requests made by counsel. *Southern Cotton Oil Co. v. Skipper*, 125/368.

523. When on contract or in tort.

Where a declaration against a common carrier is susceptible of being construed equally as an action upon contract or an action of tort based upon an alleged violation of a public duty by the carrier, and the same is not demurred to, the plaintiff at the trial may, at his option, elect to treat it as either species of action. *Pickett*, 87/734. Cited, 102/820, 822; 120/286; 128/188.

In *Palmer*, 89/161, the declaration alleged that the defendant "by the reckless negligence in running its trains in said county, and through the lands of petitioner, in the month of October, 1889, did, by its said agents and employees, and through the instrumentality of its said trains, kill and destroy five head of cattle, the property of petitioner, of the said value of \$129, as per itemized account, a

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copy of which is hereto attached as a part hereof, and which said defendant refuses to pay, notwithstanding often asked to do so by petitioner." On demurrer it was held that where, in substance, the declaration sets forth a tort, though the form be in part appropriate to an action on contract, the declaration may be upheld as one complaining of the tort; and an account annexed thereto, and referred to in the body of the declaration, may be consulted to supply a requisite date, which is not otherwise fully alleged or disclosed.

A petition against a railroad company for damages alleged to have been occasioned to the plaintiff by wrongfully carrying her past the station to which she had purchased a ticket should, though it sets forth in general terms a contract of carriage, and alleges facts showing a breach thereof, be treated as an action *ex delicto*, when it is manifest from the allegations and prayers of the petition, taken all together, that the plaintiff is seeking a recovery because of the defendant's breach of duty, and not on account of its breach of the contract. Fish, J., said: "Using the language of Chief Justice Bleckley in *Roberts*, 91/519, 'in such an action as the present, where it is well founded, a recovery may be had for the injury as a tort, as a breach of a public duty by a common carrier—a duty imposed by law—though involving in this breach a breach of contract also.' See *Brauss*, 70/638; *Pickett*, 87/734. There is no question but what the plaintiff could have brought suit for a breach of the contract. The question, therefore, presented by this ground of the demurrer, is whether the petition of the plaintiff is an action for a breach of the private contract, or an action for a tort arising out of the breach of the public duty that the defendant owed to the plaintiff as one of its passengers. This question, we think, should be decided by construing all the allegations of the declaration together. In determining whether the action is *ex contractu* or *ex delicto*, we should not pick out particular paragraphs or allegations of the petition, and consider them as being isolated from all the others contained therein, but each of them should be construed in the light of its natural and logical relations to all of the others. In this case, without the existence of a contract of carriage, the defendant would have owed no duty to the plaintiff as its passenger; and as it was necessary for her to show such a duty on the part of the defendant, as a basis from which the tort for which she sought to recover could have arisen, it was proper and neces-

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sary to allege facts sufficient to show an implied contract by the defendant to transport her from her point of departure to her point of destination, and to allow her, upon arrival at the latter, an opportunity to safely alight from the cars. As the allegations of the petition seem to show an intention on the part of the plaintiff to sue for the recovery of damages sustained by her in consequence of the breach of the public duty arising out of the contract of carriage, and not for damages resulting from a breach of the contract, those allegations which set forth the contract may well be taken as simply intended to lay the foundation for the introduction of evidence to show the existence of this public duty, preparatory to the introduction of further testimony to establish a violation of that duty amounting to the tort, which appears to be the real gist of the action. The essential facts which seem to be relied upon for a recovery constitute a tort. Certainly, as against the demurrer filed by the defendant, the portion of the petition which sets forth the contract of carriage may be treated as mere matter of inducement, leading up to the real gravamen of the suit—the tort founded upon the contract.” *Seals*, 102/817. Cited, 119/373; 128/729.

Where a declaration in an action of tort is brought against two defendants, and one of them is stricken therefrom by amendment, without otherwise altering the language of the declaration, all the substantial allegations are thereafter to be read and understood as if there had been but one defendant originally. *Whitehead*, 89/190.

Where, in the county in which a contract of passenger carriage is to be performed, a suit is brought against a railroad company upon a cause of action arising out of a failure and refusal to perform such contract, and the declaration is so drawn as to be susceptible of two constructions, under one of which the action could be construed to be a suit for a tort arising from the breach of duty, and under the other a suit for the breach of the contract of carriage, and a demurrer is filed to such action upon the ground that the court had no jurisdiction to try the cause of action sounding in tort, it appearing that the wrongful act complained of was committed in a county other than that in which the suit was brought; and where, in order to meet such demurrer, the plaintiff amended his declaration by striking therefrom the elements of damage alleged to have resulted from the commission of such tort, and, thus electing to proceed as for the breach of a contract, the plaintiff further amended his declaration by alleging generally that he had been damaged in the sum of \$500 by reason of the breach by the

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defendant of its contract, without stating the elements of such damage, how or wherein they accrued, and a special demurrer to the declaration as amended was filed, upon the ground that it did not allege with sufficient certainty the elements of the damage relied upon by the plaintiff to enable the defendant to defend the action—the court erred in sustaining the demurrer and dismissing the plaintiff's action generally, the declaration as amended being sufficient to sustain a recovery for nominal damages. *Sutton*, 101/776.

It is not incumbent upon a plaintiff, when he elects to bring an action *ex delicto* against a railway company for damages arising from a failure on its part to properly perform its duties as a common carrier of live stock, to set forth in detail, by way of an exhibit to his petition or otherwise, the precise terms of the contract of affreightment. But it is necessary that he should specifically allege, when called upon to do so by an appropriate special demurrer, that he actually sustained loss by reason of such failure of duty, and also state the particular facts upon which he relies in support of his contention that the carrier was negligent touching the transportation of the live stock entrusted to its care for shipment. *Cody*, 119/371.

In *Rushin*, 128/726, it was held that a passenger who is injured by the negligence of a carrier may, at his election, sue for a breach of the contract to safely transport, or for a breach of the duty springing from a violation of the contract of carriage. A petition does not commingle the two remedies when all the allegations taken together tend to a statement of a ground of recovery for a breach of duty. The petition is not rendered double by the inclusion of an inapt expression, where it is apparent the plaintiff does not rest his claim for recovery upon it. A petition for damages against a railroad company, for injuries alleged to have been caused by an employee carelessly and willfully slamming the car door against the plaintiff's hand, which was resting against the door facing or jamb, though it sets forth in general terms a contract of carriage and alleges a breach thereof, should be treated as an action *ex delicto*, when it is manifest from the allegations and structure of the petition that the plaintiff is seeking a recovery because of the defendant's breach of duty, and not on account of its breach of contract. *Evans, J.*, said: "The plaintiff in each of the cases of *Hardwick*, *Harn*, and *Murphy*, *supra*, had his hand injured by the slamming of a car door, but under entirely dissimilar circumstances from

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those alleged in the petition in the present case. In none of them was it alleged that the carrier's servant wilfully injured the plaintiff. The court erred in dismissing the petition on general demurrer." Cited, 129/654.

Where a petition alleged, that the plaintiff purchased a ticket from one named station to another and return, paying to the agent of the railroad company the regular round-trip rate of fare; that he traveled to the point of destination; that on his return he boarded the defendant's train and the conductor took up his ticket, but did not give him an opportunity to alight at the station where his ticket entitled him to leave the train, and carried him a mile or two beyond, and then stopped the train and told him to alight; that while he was in the act of doing so, the conductor used insulting language to him and struck him, causing him to fall from the train and be injured; and that the plaintiff sought to recover only for the tort thus done to him: Held, that this was not an action for a breach of contract, but for a tort; the purchase of the ticket, the paying of passage, and the delivery of the ticket to the conductor being alleged to show the duty arising on the part of the railroad company toward the plaintiff. Although a passenger's ticket may only entitle him to be carried to a certain station, yet, if the conductor of the train afforded him no opportunity to alight at that point, but carried him on some distance beyond and there put him off, and in doing so used abusive language and personal violence, causing injury to him, this was a tort for which an action would lie. King, 128/285.

A petition in which it is uncertain, from the allegations made, whether it is brought *ex contractu* or *ex delicto* will, in the absence of a timely special demurrer pointing out the defect, be given, as to this matter, that construction most favorable to the upholding of the plaintiff's full case as laid. Payton, 4 G. A. 762.

SUITS AGAINST RAILWAY COMPANIES BY STRANGERS.

524. Negligence in "kicking" a car.

The action, Hudson, 93/816, was brought to recover for the homicide of the plaintiff's minor son. The declaration alleged that Hudson, the son, was not employed by defendant, but was allowed and permitted by it to stay in the yard, that he might learn the yard, and do odd jobs without pay, and had been promised a regular job by defendant. He had just stepped off of one track in the yard to

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avoid a moving train, and had stepped upon another track, and was watching a train of the Atlanta & Florida Railroad that was moving through the yard, when defendant's servants in charge of a switch-engine suddenly and without notice or warning to him "kicked" a freight-car back on the track on which he was standing, and it ran over him. Defendant's servants were negligent in "kicking" the car back, instead of moving it in the regular manner, by pushing it with the engine, and in not seeing Hudson on the track when they ought to and could have seen him if they had looked. Neither the conductor, engineer, nor fireman of the engine was on the lookout, and had put no one else on the lookout. The train-hand whose duty required him to be on the front or forward end of the train when moving was out of his place, and on the end of the car nearest the engine, and did not try to look to see whether any one was standing on the track. All of said acts and omissions constitute gross and criminal negligence, and show a wanton disregard of the life of Hudson, who was entirely free from fault, and in no way contributed to the cause of his death. He was standing, when the car was "kicked" back, sufficiently far from the end of it for the crew of the engine to have seen him, and had been standing on the track long enough for them to know that he was on the track. He did not know, and could not have known, that it was their intention to move said car, or "kick" it over the ground he occupied. The spot where he was killed was adjacent to the stopping-place of the Atlanta & Florida and defendant's passenger-trains, and was the public landing-place where the passengers of said trains embarked and disembarked; and there was a constant by-path used by the public, with the knowledge and acquiescence of the defendant, over the track at the spot where Hudson was killed. At the time he was killed, an Atlanta & Florida passenger-train was at said point; and, by reason of all the foregoing facts, a greater duty was imposed on defendant to exercise care and caution in moving trains along at this point. The amendment offered but disallowed alleges that when Hudson stepped upon the track on which he was killed, to avoid the Atlanta & Florida train, his attention was attracted by said train, and the din and clatter in the yard and the hissing of steam on said train, and he was looking at it; and that the employees in said yard constantly walked or stood on said track, and the public frequently stood there; and the servants of defendant in charge of the train that killed him knew these facts. A demurrer to the declaration was sustained, and it

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was held that the court erred in sustaining it, as the jury should have been allowed to pass upon the question whether the company was negligent in "kicking" the cars at so public a place as the one described in the declaration, and upon the question whether there was negligence on the part of the plaintiff barring his right to recover.

525. Description of ticket, train, etc.

In Dyson, 109/103, the plaintiff alleged that she had been unlawfully expelled from a train. The ticket that she claimed gave her a right to passage she alleged was purchased from the company's agent and was described in the declaration as "a ticket from Mableton to Atlanta, Ga., over defendant's line, paying therefor the sum of forty-seven cents." The defendant demurred to the declaration on the ground that "there is no description given of the ticket; because it is not stated what writing or printing or stamp appeared on said ticket, nor any of the conditions, dates, or anything going to show the character of said ticket." The demurrer was overruled, which was reversed by a majority of the court, and it was held that when the petition in an action against a railway company for damages alleged to have been sustained by the plaintiff's unlawful expulsion from a train insufficiently describes the ticket presented to the conductor as the evidence of the former's claim of a right to passage, it is erroneous to overrule a special demurrer properly pointing out the defectiveness of the petition in this respect. Lumpkin, P. J., said: "The character of the ticket was of the utmost importance in determining whether or not the plaintiff was legally entitled to ride upon the train from which she was expelled. She claimed to be a passenger of the company under a contract with it evidenced by this very ticket and surely the defendant, when it, by special demurrer, called for a description thereof, was entitled to have the same. The petition did not allege that the price paid for the ticket was at the maximum rate allowed by law, or that it was unlimited as to time." Fish and Lewis, JJ., dissenting, said: "Even if, in such an action, it was necessary to describe the ticket at all, the description in the present petition was sufficient. The special demurrer assumed that the ticket contained conditions, when it did not appear from any allegation in the petition that such was the fact, and therefore in this respect the demurrer was, in effect, what is termed a 'speaking demurrer.'" Same case, 113/327. Dis., 128/287.

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In *Sims*, 111/820, it was held that, in an action against a railroad company for a homicide alleged to have been caused by the negligent running of its locomotive and cars, there was no error in overruling a demurrer to the petition on the ground that it did not allege what particular train, car, engine, or machinery of the defendant company struck and knocked the decedent from its track, or in what direction, north or south, the train was running, or at what hour the casualty occurred, or "specify the particular acts of carelessness and negligence of defendant, and how and in what manner its locomotive, cars, and machinery was negligent and careless." Cited, 113/642. Doubted, 120/479.

Where a petition alleged that the plaintiff had purchased from the agent of a railroad company a ticket from one place to another and return, paying therefor the full round-trip rate of fare, and that on his return passage the conductor received the return ticket from him, and also that he paid the defendant full first-class fare from the point of starting to the point of destination and return, and had the right to be treated in a decorous manner, as the law requires that passengers shall be treated, the defendant having accepted his money for the ticket, and having taken the ticket from him, this was a sufficient description of the ticket. A demurrer to such a petition, on the ground that it did not state what writing, printing, or stamp appeared on the ticket, if any, or what were the conditions or dates on the ticket, or that the price paid for it was the maximum rate allowed by law, or that it was unlimited as to time, or that it was good as to the train on which he took return passage, running on this schedule, and for this particular day and date, was properly overruled. *King*, 128/285.

In a suit against a railroad company for damages for the killing of stock, a declaration which alleges the number of animals killed, the sexes, the time and place of the injury, and alleges them to be of an average value of \$15, is not open to demurrer upon the ground that "the separate items of damages were not sufficiently set forth." *Sheffield*, 127/569.

526. Impairment of capacity to labor embraced by implication.

A declaration by a married woman against a street-railway company for injury to her person, which alleges a definite personal injury which incapacitated her to walk without crutches, embraces

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by necessary implication the impairment of her capacity to labor. *Jacobs*, 88/647. Cited, 90/508; 107/73; 125/368; 133/235.

BY EMPLOYEES.

527. When a declaration is sufficient.

A declaration filed by an employee of a railroad company to recover damages for injuries inflicted upon him in consequence of the negligence of a coemployee, which states the nature of the employment, the character of the work in which they were engaged, the extent of the injuries, and the amount of the damages, and likewise the circumstances under which he was injured—the latter being stated with such particularity as to show that he was himself free from fault, and was injured solely because of the negligence of his fellow servants—sets forth substantially a cause of action, and a dismissal upon demurrer was erroneous. *Maloy*, 97/295.

A declaration alleging that the plaintiff's husband, an employee of a railroad company, was killed by an engine of the company, setting forth such a statement of the facts and circumstances connected with the killing as did not of themselves negative the existence of negligence on the part of the company, and distinctly averring that the deceased was without fault, and that the killing was caused by the negligence of the company's servants in the running of such engine, was not demurrable. *Lumpkin, J.*, said: "If all the allegations in the declaration are true, a cause of action is set forth, and it was not necessary that the plaintiff should minutely and in detail describe every fact and circumstance in the case which would tend to show the want of negligence on the part of the deceased. The declaration was sufficiently full and accurate to inform the defendant of the nature of plaintiff's complaint, and this is all the law requires." *Hubbard*, 86/623.

In a suit against a railroad on account of the homicide of an employee, an allegation that the company did the negligent or careless act which caused the homicide, or omitted the diligence which would have prevented it, is sufficient, and is equivalent to an allegation that the coemployees of the decedent were guilty of such negligence. *Crosby*, 74/737.

In *Griffin*, 8 G. A. 341, a widow sued for the death of her husband, and the case was dismissed on demurrer. *Hill, C. J.*, said: "It is manifest, from the allegations of the petition, that the con-

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ductor would not have been injured or killed but for the concurrence of all three of the acts of negligence alleged. His position between the wall and the car would not have been dangerous if the engineer had obeyed the signal and slowed down and stopped the car before reaching the point where the conductor was standing. In so far as the brick wall is concerned, it may be stated that its proximity to the track was an obvious danger, plainly apparent to the conductor; and this may be conceded to be true also in reference to the broad-gauge car on the narrow-gauge track; and if these were the only allegations of negligence, the plaintiff could not recover. But as before stated, it is manifest that the proximity of the wall to the passing broad-gauge car would not have injured or killed the deceased but for the negligence of the engineer in failing to obey the conductor's signal to slow up and stop the backing train of cars. The conductor, in taking this position in the discharge of his duty, as alleged, had the right to believe that the engineer would obey his signal and stop or slow down the cars. In other words, the position of the conductor between the wall and the track was rendered dangerous only by the negligent conduct of the engineer, and but for such negligent conduct this position would have been entirely free from danger. The negligent conduct of the engineer, therefore, in not obeying the conductor's signal, was, under the allegations of the petition, the proximate cause of the homicide. The petition negatives contributory negligence on the part of the conductor; hence a cause of action was set out. It can not, of course, be logically claimed that the act of the conductor, in standing between the wall and the track, necessarily constituted contributory negligence; for the very simple reason that it is alleged that it was not a place of actual danger, until made so by the engineer's failure to obey the signal given to him by the conductor, to stop or slow down the backing cars. We think, therefore, that the court erred in sustaining the demurrer and dismissing the petition."

528. Baggage-master injured by the spout of a tank.

A declaration alleged in brief as follows: Plaintiff was a baggage-master on defendant's train, and in addition it was his duty to look after the condition of the cars, and generally to do everything in his power to preserve the safety of the trains and passengers. On the day of his injury he was notified that new wheels had been

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put under one of the cars, and that he should look out for them. Soon after leaving Atlanta, the new wheels became hot and made a noise; he went to the side door of the baggage-car to see if they were in a condition to endanger the safety of the train, and while thus looking out, without fault or negligence on his part, he was stricken by a spout of a tank of defendant, resulting from the negligence of the latter in placing such tank or spout so near as to strike him while discharging his duty and looking out of said car in an ordinary and usual manner. It was his duty, and necessary for him to be in the position he was in at the time of the accident, and he did not and never had known that the tank was so near the track. It was held that a case was substantially made by this declaration and the court properly refused to dismiss it on general demurrer. Crawford, J., said: "The only defect, if there be any, apparent to us is the failure to allege in connection with plaintiff's want of knowledge as to the location of the spout and tank, that it was no part of his duty as an employee of the road to have known where it was located. A special demurrer would have reached that defect in the pleadings, but none such was made, and the court had to pass on that which went to the whole case, and was properly overruled, as the allegation that he was without fault or negligence was good on general demurrer." Woodruff, 66/707.

529. Yardmaster struck by an electric-light pole.

In Blackstone, 105/380, the petition alleged that while plaintiff was in the employment of the defendant as yardmaster, his duties being to switch, to make up trains of cars in the yard, it became necessary to couple a freight-car to a switch-engine and cars in the yard. Several attempts were made to effect the coupling, without success, owing to the difference in the height of the couplers and bumpers of the cars. Finally he succeeded in coupling the cars and ordered the train to move on. He mounted the outside ladder of the car as it was his duty to do, and as cars having bumpers and couplers of unequal height are liable to become uncoupled while in motion, it was his duty to look out for such an emergency. Accordingly, when the train was put in motion and was running at seven or eight miles an hour, and while he was carefully and securely standing on the ladder and looking back towards said car, as his duty required him to do, he was struck by an electric-light pole in the yard of the company, on the side of the

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track of the road. At the time of the injury he was in the discharge of his duty and wholly without fault. He could not, while attending to his duties, have seen the electric-light post, and was not aware that it was so near the track as to be dangerous to one in the position he occupied. His injuries were occasioned solely by the negligence of the company in erecting and maintaining an electric-light pole in the yard of the company too near the track. It was held that though the petition of an employee of a railway company, suing the latter for personal injuries, may contain allegations from which it might be inferred that it was the plaintiff's duty to have known and to have removed the cause from which his injuries resulted, yet, when such an inference does not necessarily follow from the averments of the petition taken as a whole, and it affirmatively alleges that the plaintiff was "wholly without fault," and that at the time he was injured he was attending to his duties, and was not aware of the danger to which he was exposed, the petition is good as against a general demurrer. Where, however, the cause of the injury was alleged to be a pole, concerning which the petition, in general terms, only alleged that it was "too near the track," and the defendant by special demurrer made the point that the petition did not allege "how near said pole was to the track," the petition ought to have been amended so as to set forth the facts as to this matter more fully and explicitly; and, in the absence of such an amendment, this court will not reverse a judgment sustaining the demurrer and dismissing the action. Little, J., said: "The allegation of the petition is that the plaintiff was in the discharge of his duty when he was injured. It is true that at the time he was injured he was mounted on a ladder attached to one of the cars while the train was in motion. Ordinarily this would be held an act of negligence, but, referring to it, the petitioner alleges that it was his duty to place himself in that position. It would also seem, in the absence of explanation, that the plaintiff could have avoided the consequences of the defendant's negligence, if it was negligent, by the exercise of proper care on his part, but the allegations in the petition are that the very acts which seem to show a want of prudence were done strictly in the discharge of the plaintiff's duty. We are not at liberty to disregard such allegations in construing the petition, and can not therefore say that notwithstanding such allegations, the plaintiff contributed to the injury, or that he could have avoided the same by the exercise of proper

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care or that the injury was occasioned by his own negligence; nor can we rule, as a matter of law, that it was the plaintiff's duty to have known of the electric pole which caused his injury, and its proximity to the track. While the petition sets out the fact that the plaintiff at the time of the injury was yardmaster of the defendant in its railroad-yards in the city of Augusta, it also sets forth the duties of such an employee; that is, it was his duty to switch and make up cars and trains of cars in the yard, superintend their transfer to the main line of the road, and to do general yard work. What duties other than those enumerated this work imposed, we have no means of ascertaining. We of course recognize the principle that if the plaintiff had knowledge of the location of the electric pole, or if, from his duties as yardmaster, or his familiarity with the yard, he was chargeable with such knowledge, or if he had charge and control of the yard in which the pole was located, with power, as the representative of the defendant, to place such pole in proper position, he would not be entitled to recover. But the petition does not contain any reference to these facts. On the contrary it alleges that at the time the plaintiff received the injury he was in the discharge of his duty, and was wholly without fault, and that the injury sustained by him was occasioned by the negligence of the company in erecting and maintaining such pole at the place where it was located. Therefore we can not say, as a matter of law, that, because he discharged all the duties of yardmaster, it was within his power to remove such pole, nor that he was chargeable with notice thereof, nor necessarily guilty of negligence in occupying the dangerous position in which he voluntarily placed himself at the time of the injury." Cited, 112/762; 115/939; 120/231; 122/698, 562; 119/375; 130/469; 2 G. A. 554.

In *Miller v. Merchants & Miners Transportation Co.*, 115/1009, it was held that a petition to recover damages for personal injuries, against a transportation company, which in general terms alleged negligence in that the cargo of a ship was improperly distributed and the ship itself defectively constructed, was properly dismissed upon special demurrer calling for particulars as to the alleged negligence, when the petition was not amended to meet the objections raised by such demurrer. Fish, J., said: "It will be observed that the negligence of the defendant, which the plaintiff alleged caused his injuries, was the improper loading and distribution of the ship's cargo, and the defective construction of the ship. The defendant,

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in order to prepare its defense, was entitled to be put on notice of the particular manner in which the plaintiff expected to show that the cargo was improperly distributed, and also the particular defects which plaintiff expected to prove existed in the construction of the ship. The defendant, by an appropriate special demurrer, called for the information to which it was entitled. The plaintiff declined to amend the petition in the respects indicated."

530. Averments as to time, place and manner.

In *Woodson v. Johnston & Company, Limited*, 109/454, it was held that an employer is liable in damages for physical injuries to an employee resulting from the negligence of one who was the general superintendent of the business of the former, and who, on the occasion when the injuries were sustained, was acting as the employer's alter ego, and not in the capacity of a fellow servant of the person injured. Though the petition in an action for such injuries alleged that they were received while the plaintiff was working in the hold of a ship, it was not essential to set forth its name, or the names of his collaborators, or to aver that the defendant was responsible for the negligence of the latter; the time, place, and manner of the occurrence giving rise to the cause of action being by means of other allegations sufficiently stated.

531. Laborer at a roundhouse failed to show that he was not a trespasser.

A declaration in an action against a railway company for damages resulting from personal injuries did not set forth a cause of action where its only allegations relating to the circumstances under which the injuries were inflicted were, in substance, as follows, viz.: That the plaintiff was an employee of the defendant, who labored in its roundhouse; that it was customary for him to walk between its lines of track so as to reach the roundhouse; that while so walking he was struck from behind by a moving car, which was being propelled towards him by an engine; that he was not warned of the approach of the car by the ringing of the bell or the blowing of the whistle of the locomotive, nor by call of the engineer or fireman, and that the company was negligent in failing to give such warnings. These averments are not sufficient to show that the plaintiff was not a trespasser, since it might or might not have been necessary for him to reach the roundhouse by walking between the lines

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of track, and it does not appear whether or not his custom in this respect was known or sanctioned by the defendant. As the declaration does not, by proper allegations, concerning these matters, affirmatively show he had a right to be at the place where he was when injured, it is proper to deal with him as a trespasser; and, this being so, the specific acts which caused his injuries, and which are averred to constitute the negligence entitling him to recover, were not, relatively to him, negligent at all, for the reason that they involved the breach of no duty due to him by the defendant. Construing the petition most strongly against the plaintiff, it would not follow, as a conclusion of law, that under the facts alleged he was entitled to a verdict, and, accordingly, a general demurrer to such a declaration ought to have been sustained. Atkinson, J., dissenting. Chaney, 101/420. See this case again, 102/814.

BY PASSENGERS.

532. Plaintiff's own negligence caused the injury.

In Paterson, 85/653, the plaintiff alleged that when the train was within two or three hundred yards of the depot at Waynesboro, the place of his destination as a passenger, the station was called in the usual way; whereupon plaintiff, being without baggage, and knowing that the train would cross Whitaker street before it reached the depot, upon which street plaintiff resided, went out upon the platform of the car, with the purpose of alighting at the Whitaker street crossing. The train was then moving slowly and at a uniform rate of speed, so that there was absolutely nothing in his situation to suggest danger to even the most cautious. As he anticipated, the speed of the train gradually decreased as it neared the crossing, which was within the corporate limits of Waynesboro, and within about one hundred yards of the depot, where the defendant's trains were accustomed to stop to deposit and receive passengers and freight, and where it did stop on the night in question. The plaintiff could see that the place where he intended to leave the car was clear of obstructions, and he stood upon the steps of the platform preparatory to stepping off when the crossing should be reached. He knew, and defendant's agents and servants on the train must have known, that by reason of the low rate of speed required of them when nearing a depot or public street-crossing, especially within the corporate limits of a city, it was customary for people

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to stand upon the platforms preparatory to leaving the trains; and they knew, or should have known, that it was not unusual, when a train was passing through cities, for passengers to get on and off at the street-crossings; and plaintiff had no reason to apprehend that they would, under such circumstances, negligently imperil the safety of passengers. But while he was so standing upon the steps of the platform, in the use of all proper precaution, and as the rear end of the car on which he was standing reached the crossing, the engineer or other servant of defendant, or other person unknown to plaintiff in charge of or upon the engine, needlessly, unskillfully, and negligently put on a great force of steam, and the train was jerked forward suddenly, and without warning, whereby plaintiff was thrown from his balance, and the right side of his head and face came in violent contact with the iron railing to the steps on platform or other parts of the car, bruising and wounding the same, and he was stunned and thrown upon the ground. It was held that the plaintiff's declaration, showing that the injury complained of was caused by his own negligence, and not by that of the defendant, a demurrer thereto was rightly sustained. The right to amend this declaration was subsequently denied because the application to amend came too late. 87/646. Cited, 118/149. Dis., 119/930.

A declaration alleging that the conductor of a passenger-train agreed with plaintiff to stop the train for him to get off at a point where there was no regular station, but at which defendant's road crossed another railroad at grade; that plaintiff paid his fare to this point; and that on reaching the same the train only slowed up, and did not stop, so that plaintiff, "in order to keep from being carried beyond his destination, was compelled to get from the moving train," and in so doing was seriously injured—does not set forth a cause of action, it appearing from these allegations that plaintiff's injury was caused by his own voluntary act in taking a dangerous risk if the train was moving so rapidly as to make leaving it unsafe; or, if not, that the injury must have resulted from a mere accident, or from plaintiff's own carelessness in getting off. Barnett, 87/766. Cited, 98/492; 103/571; 114/899.

A passenger, though a minor about the age of sixteen, who voluntarily alighted from a moving train, was not entitled to a recovery from the railroad company for injuries thus sustained, it not appearing that he was directed so to do by any agent or servant of the

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company, but that, in consequence of a fear that he would be carried beyond his station, he took upon himself the risk of leaving the train in this manner. This is so even though the train was running at a speed which indicated that it would pass the station in question without stopping. If the train was moving so rapidly as to make leaving it unsafe, the plaintiff's injury was caused by his own voluntary act in taking a dangerous risk. If not, then the injury must have resulted from a mere accident, or from the plaintiff's own carelessness in getting off. *Barnett, supra*. Under the facts alleged, the court committed no error in sustaining the defendant's demurrer to the plaintiff's petition. *Jones, 103/570. Cited, 114/899; 120/464.*

Though it may not, under all circumstances, be an act of negligence to alight from a moving train, yet where a passenger, when the train upon which he was riding was moving away from the station of his destination, "went out on the platform and got on the steps of the car, * * * moved down the steps, put one foot off, and swung himself in a position to get off," but was not "able, in the position in which he was then placed, to step on the ground," and, while in this position, discovered a telegraph post near the track, "and perceiving that if he undertook to recover himself and get back on the train he would strike said post, and perhaps fall under the train, turned loose and was thrown to the ground," and in consequence received physical injuries, he was not entitled to hold the railway company liable therefor. There was no error in sustaining a demurrer to the plaintiff's petition. *Lindsay, 114/896.*

Where, in a suit against a railroad company for damages caused by the killing of her husband, the plaintiff alleges that her said husband was a passenger on defendant's train, and was wrongfully ejected therefrom while in a helpless condition, known to the conductor and servants in charge of the train, and was left in a dangerous place near the railroad track, and that on account of these negligent acts of defendant's servants he was run over and killed by a second train of defendant, which followed a few minutes after the one from which the deceased was ejected, Held: (a) The allegation that the deceased was ejected from a designated train of defendant, "near a trestle and almost in the yards of the said railroad company * * * in or near a swamp in the city of Macon," was sufficient identification of the place of expulsion. (b) The proximate cause of the injury was the negligence of the serv-

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ants of the defendant in charge of the train from which the deceased was ejected, and the allegation of his apparent helpless condition was merely allegation of a fact serving to put the servants on inquiry and notice of the danger of leaving him in the position where they placed him. It was not necessary in such case to allege the cause of the helpless condition of the deceased, nor was it necessary specifically to allege the motive which influenced the servants in the alleged wrongful act. Lumpkin and Beck, JJ., dissenting. We are of opinion that the allegation that the plaintiff's husband was "almost in a helpless condition," without alleging whether he was sick, or drunk, or lame, or any fact on which helplessness was predicated, was subject to special demurrer. An allegation that the defendant's conductor was apprised of such condition would not cure an insufficient allegation as to the condition itself; nor would a statement that by reason of his condition he was unable to leave the track. Except as herein indicated, we concur in the conclusion of the majority of the court. Moore, 125/811. Cited, 3 G. A. 5, 176.

533. A violent and unusual jerk.

In Garland, 111/852, it was held that where a petition, in an action against a railway company for personal injuries, alleged in substance that the plaintiff was a passenger upon a freight-train of the defendant; that, at the request of the conductor, he occupied a seat in the upper part of the cab, and remained there until the train reached the outskirts of the town to which he was going, when, the train coming to a full stop, which the plaintiff thought was for the purpose of allowing him to get off, he, in order to get his effects together, preparatory to leaving the train, followed the conductor to the lower part of the cab, where the conductor left him standing, saying to him, "Stay here until we pull up to the depot, and you can then get out;" that the train then moved forward rapidly, and plaintiff, for the purpose of seeing when he reached the depot, stood by a window of the cab, holding firmly to the window, in such a position as to protect himself against all ordinary and usual jerks and jars incident to a freight-train; that while he was in this position the train, by reason of the negligence of the defendant's employees in charge thereof, was suddenly, and without warning, stopped, with such a tremendous, unusual and unnecessary shock as to jerk plaintiff's hands loose from the window, so violently

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wrenching them from their hold upon the window as to tear a ring and the flesh from one of his fingers; that the shock overturned buckets of water in the car, moved several inches an iron stove, which was fastened to the floor, and threw the plaintiff violently against some obstacle in the car and to the floor, rendering him for a time unconscious; that he sustained very serious injuries, the nature and extent of which, his sufferings therefrom, his earning capacity before, and for a stated period after, the injury, and the pecuniary amount of his damages, being all set forth—held, that the petition set forth a cause of action, and should not have been dismissed upon demurrer. Cited, 114/307.

534. No authority in flagman to order him to alight.

Although the declaration does contain some loose allegations that the plaintiff was injured by the negligence of the employees of the defendant railway company in certain specified respects, it shows clearly by other allegations that this negligence was not the real cause of the injury; and the true meaning of the declaration, taking together all of its averments, and fairly construing them, is that the negligence which did cause the injury was that of a flagman in ordering the plaintiff to alight from a moving train in the dark at an unsafe place. This being the plaintiff's real cause of action, if he had any at all, and the declaration failing to allege that this flagman had any authority to give such order, or that the giving of it was within the scope of his duties, or that he gave it by direction of the conductor, no cause of action was set forth; and, there having been no offer to amend the declaration, the demurrer to the same should have been sustained. Even if the evidence introduced upon the trial was sufficient to show that the flagman, under instructions from the conductor, in fact had authority to see to the plaintiff's alighting from the train, and accordingly to give him the order to do so, and even if the giving of the order was, under all the circumstances, negligence, the verdict can not stand. The declaration not setting forth a complete cause of action, the trial and its results were mere nullities. Simmons, C. J., said: "The case differs essentially from that of Smith, 69/268. There the declaration alleged injuries to the plaintiff caused by the negligence of the defendant's 'agents,' without specifying who the agents were; and this was held to be good as against a general demurrer. In the present case the declaration contains allegations that the plaintiff

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was injured by certain acts of negligence on the part of defendant's employees; but the act of negligence which the declaration shows to be the real cause of the injury was that of a certain designated employee; and this employee being a flagman, not presumptively charged with the duty of seeing to the disembarking of passengers, the declaration ought to have alleged that his directing the plaintiff to get off was within the scope of his duties, or that on this particular occasion it was made his duty by the conductor's order." Wall, 96/328.

535. Passenger ejected and run over and killed.

A declaration alleged that a passenger on a railroad-train in South Carolina "was violently ejected and thrown from said cars by the defendant and its agents and servants in the course of their employment, and in being thus forcibly and unjustly ejected from said cars as aforesaid, was thrown thereunder and run over and killed thereby." The evidence showed that the passenger was run over and injured by this train; that about an hour afterwards another train ran over the body; whether life was extinguished by the first or the second was not absolutely certain. It was held that such declaration furnished a sufficient basis for recovery on these facts. If it were necessary to include any allegation concerning the second train it could be done by amendment. Nix, 68/572.

536. Passenger went into the baggage-car and was injured.

In Gardner, 94/538, the plaintiff alleged that he entered defendant's passenger-train at Waycross, at the regular and usual place of receiving passengers, just before the usual time for the train to start. No engine was then attached to the train; and, desiring to speak to the conductor about being put off the train at a point just beyond Walerstown (a station on said railroad), plaintiff went into the baggage-car for that purpose, and, while thus engaged with the conductor, defendant's agents and servants, without any notice or warning to plaintiff, and without the exercise of ordinary and reasonable care, negligently turned loose an engine at the upper end of the yard, and said car came down the track, and struck the car in which plaintiff was standing, throwing him to the floor, and injuring him in a manner described. He had not purchased a ticket, as they sold none at that time. He had money with which to pay his fare, and had entered the train as a passenger, with the

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intention of traveling just beyond the river at Watertown. Before he left the passenger-coach and entered the baggage-car, he looked out, and saw that there was no engine at or near the train; and, with the exercise of ordinary and reasonable care on the part of the defendant's agents and employees, the accident could have been averted. The defendant demurred on the ground that the declaration set out no cause of action; whereupon the plaintiff amended "by striking the allegation that a car was turned loose from the upper end of the yard," and making the declaration read: "An engine, with car attached, was run down on the track with great and unnecessary force and speed, striking the car in which petitioner was standing, thereby violently throwing him down and injuring him as aforesaid." He further alleges that the engine then in use by defendant was an old one, without the usual and necessary appliances and improvements to its proper and careful handling in the coupling and drilling of cars and trains; and that the engine and cars then in use by defendant were old, and without the needful appliances of air or automatic brakes and automatic couplers and safety-buffers, such as are usual and necessary to make the handling of passenger-trains and the carrying of passengers safe. It was necessary for him to go into the baggage-car to see the conductor, and it was usual for passengers so to do, and there were no restrictions on the part of defendant against their so doing. It was held that the declaration, as amended, set forth a cause of action, and it was error to dismiss it on demurrer. This case again, 97/482. Cited, 114/762.

AGAINST MUNICIPAL CORPORATIONS.

537. Unprotected mouth of sewer in a street.

In *Bryan v. Mayor, etc.*, 91/530, it was held that the declaration sets forth a cause of action, the allegations being in substance that plaintiff was driving a mule hitched to a buggy in a street of the city of Macon. His mule becoming frightened, he jumped from the buggy; and while his attention was thus directed to his mule, plaintiff, without fault on his part, fell into a hole—the mouth of a sewer in said street. The sewer was unprotected, and in a dangerous condition, and had been so for ten days, and its condition was known to the city, to whose negligence it was due. Bleckley, C. J., said: "It is not alleged precisely how the sewer was connected

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with the street relatively to the position of the opening, but it is alleged that the danger it occasioned was due to the defendant's negligence. Can the defendant admit that the plaintiff was injured, that he was without fault, that the city was negligent, and that a dangerous hole, left open by its negligence, was the one into which he fell, and yet avoid liability? Clearly not. The declaration may be defective in form by reason of not setting out with more particularity and distinctness the position of the hole, whether at the edge of the street, or how far inside, etc., but it is good in substance; and to withstand a general demurrer nothing more is requisite."

538. Street-railway and electric company.

In *Owings*, 97/663, it was held that where, in the prosecution of its business, a corporation employs a wire which, because of its being charged with a powerful and dangerous current of electricity, is liable, upon coming in contact with wires of other corporations, to cause injury or death to employees of the latter while engaged in the performance of their duties, the corporation first referred to is, relatively to such employee, under the duty of observing at least ordinary diligence, not only in preventing such a contact, but also in discovering and preventing its continuance, even when occasioned by the negligence of others, including that of a corporation whose employees are thus exposed to danger. Cited, 104/62.

In *Griffith v. Telegraph and Railway & Electric Company*, 104/56, the plaintiff alleged that the defendants allowed their wires to come in contact with each other at a certain named place, and at divers places in the city; that one of the poles on which the wires were, fell across a roadway, and in driving along there one of plaintiff's horses stepped upon one of the wires and received a shock throwing it to the ground. In falling, the horse tilted the vehicle, and threw plaintiff out and injured him. The case was before the court on a motion to remove it to a Federal court. Lumpkin, P. J., said: "The gist of the present action was the joint negligence of the defendants in maintaining, rather than in producing, a dangerous agency which was a constant menace to the life and safety of the general public, caused by a contact between their wires, which, though charged with a deadly current of electricity, were allowed to remain on the ground in a public thoroughfare for thirteen days, although both defendants had notice of this state of affairs, and

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made no attempt to repair the mischief. That both of them were equally culpable in thus maintaining this dangerous agency is not to be doubted if these allegations are to be taken as true; and this being so, it would not matter, so far as their joint liability to her was concerned, which of them was responsible for allowing their wires to come in contact. Indeed, even were they entirely blameless in this regard, it was the imperative duty of each to promptly take the proper steps to replace its wires in a condition of safety so soon as notice was had of the danger thus created." This case was again before the court, 111/551, and it was held that, as was, in effect, ruled when this case made its first appearance here, the plaintiff's petition set forth a cause of action, and was not open to demurrer on the ground that there was a misjoinder of parties defendant. The plaintiff went even further into detail than was necessary in describing the location of the wires and poles belonging, respectively, to the defendant companies, but the petition was defective in that it failed to state with sufficient particularity at what points the plaintiff expected to prove that they negligently permitted their wires to remain in contact. They were not, however, entitled to notice as to the character or extent of the evidence upon which the plaintiff expected to rely as showing knowledge on their part of facts with which they were alleged to have been acquainted. The petition did not disclose facts showing that the plaintiff was not entitled to recover expenses incurred for medical attention, etc., but was subject to demurrer on the ground that the amount of such expenses was not therein alleged. Cited, 3 G. A. 4; 6 G. A. 388; 122/474; 130/153; 133/458.

In Johnson, 4 G. A. 742, it was alleged that defendant was engaged in transmitting electric light and power, and for that purpose had wires strung along the streets of the city of Rome. One of the wires thus used for the transmission of electricity was strung around the corner of Second avenue and East Fourteenth street, and had been covered with insulated wrappings. By the pressure of a limb of a tree, the insulation had been worn off for two or more weeks at the time of the injury mentioned in the petition. The wire had been caught under the limb of this tree and was stretched downward thereby. The plaintiff, as a helper to one Ben Lumpkin, had been employed to trim the trees along this portion of the street, and, while trimming this particular tree, the limb against which the wire was pressed released the wire, and it flew

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up and struck the plaintiff on the hand. The wire was heavily charged with electricity and the plaintiff, in addition to being shocked, was knocked out of the tree to the ground, a distance of thirty-five feet, and thereby sustained enumerated injuries. The plaintiff alleged his own ignorance of the condition and dangerous character of the wire. Powell, J., said: "If the defendant was rightfully in the tree, the petition sets forth a cause of action. Owings, 97/663 (25 S. E. 377, 33 L. R. A. 498). Compare Andrews, 89/653 (16 S. E. 203). The contention of the electric company is that the plaintiff was in the tree, attempting to trim it, without first complying with the city ordinance, which he himself sets up in his petition. This tree was not the property of the electric company; therefore, the plaintiff was not a trespasser upon its premises; and those decisions which define the relative duties existing between landowners or similar proprietors and trespassers upon their premises are not immediately in point. On the other hand, if the plaintiff, at the time of the injury, was himself engaged in an unlawful act, and this was the proximate, contributing cause of his injury, he should not recover; provided the particular phase of his conduct in which the unlawfulness consisted was an act of which the defendant had a right to complain, either by reason of the fact that it breached some duty which the plaintiff as a fellow citizen owed to the defendant, or because the plaintiff placed himself within the range of the defendant's dangerous instrumentality in a manner which the defendant could not reasonably have anticipated."

Where the wires of an electric-railway company and those of a telephone company are strung to the pole of the former, and the wire of the latter breaks and falls to the street below across the wire of the former, therefrom becoming charged with a high current of electricity, and a horse, while being driven along such highway with due care, is killed because of contact with such wire, both companies are jointly liable for such damage, where it is the result of the concurring negligence of the two companies, and would not occur in the absence of negligence on the part of either. Where the petition alleged that the horse was killed because of the negligence of the telephone company in permitting its wire to become so worn and weak as to break and fall to the street, and because of the separate acts of negligence of both companies in not having their wires sufficiently insulated, and in not having suffi-

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cient guard-wires to prevent the telephone wire from coming into contact with the wire of the other company, such petition was not subject to demurrer on the ground that there was a misjoinder of parties, and that the petition shows that the defendants are not joint tort-feasors, and seeks to bring two separate and distinct causes of action against separate and distinct parties in the same petition and in the same count. *Eining*, 133/458.

In *Southern Bell Telephone Co. v. Howell*, 124/1050, it was held that, where a declaration alleged that a telephone company, in stretching wires along a public street of a city, permitted one of them to sag while heavily charged with electricity, or to become so charged with electricity while thus sagging, at a place where it was likely to injure pedestrians, and gave no warning of the danger arising from such charge, in consequence of which a person walking along the street came in contact with the wire and was seriously injured by the electric charge, this sufficiently stated a case of negligence on the part of the defendant to withstand a general demurrer. It is not negligence as a matter of law for a pedestrian to cross a public street at a point where there is no crosswalk. The use of public streets between crossings is not limited solely to animals and vehicles. Such use by footmen does not necessarily constitute negligence, if due caution is exercised. Where a declaration alleged that a pedestrian was going along a street and started to cross it, when he was struck in the face by a wire which a telephone company had negligently allowed to sag while highly charged with an electric current, or to become so charged while sagging, without giving warning of the danger, and that while seeking to guard his face from the wire the plaintiff's hand came in contact with it and was injured by reason of the electric current, and that he was without fault or negligence in and about the transaction, and was in the exercise of due caution and diligence, a general demurrer, on the ground that the plaintiff was not in the exercise of ordinary care and prudence for his own protection, and that by the exercise of such care he could have avoided the injury, was properly overruled. Cited, 133/463.

Without regard to the respective contentions of the parties as to the proximate cause of the electric-light wire being down across the street which the plaintiff was traversing at the time that he came in contact with it, and was injured by the electric current with which it was charged, the jury could have found from the evidence

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that the proximate cause of the plaintiff's injuries was negligence on the part of the defendant in turning on such electric current, after receiving actual notice that the wire was down, and without taking any steps to remove the dangerous situation which existed by reason of its being down. Hence, there was no merit in the general grounds of the motion, nor in the ground complaining of the refusal to grant a nonsuit. The question whether the plaintiff, who was only about seven and a half years old when he received the injuries of which he complained, could, by the exercise of due care, have avoided the consequences to himself of the defendant's negligence, was one for determination by the jury, and under the evidence they were authorized to find that he could not. *Mayor and Council of Madison v. Thomas*, 130/153.

In *Height v. Southern Telephone & Telegraph Co., et al.*, 122/474, it was held that where a telephone wire is broken by a storm which could not have been anticipated or reasonably foreseen, and falls upon an electric-light wire which is charged with a heavy and dangerous current of electricity and which has become grounded by the falling of a tree from the effects of the same storm, the liability of the owners of the respective wires depends upon the negligence in the construction and maintenance of the wires, where the injury occurs immediately after the falling of the wires and neither company has a reasonable time to discover and remove the danger. *Evans, J.*, said: "Persons or companies operating telephone and electric-light systems for the transmission of electricity upon and over public highways owe to the public the duty of properly constructing and maintaining their respective wires and poles; they are bound to provide such safeguards against danger as are best known and most extensively used, and all necessary protection must be afforded to avoid casualties which may be reasonably expected. *Higgins*, 73/164; *Davis v. Augusta Factory*, 92/712. They are not insurers against accidents, but are bound to use reasonable care proportioned to the danger of injury. In determining whether the proper care and diligence in construction or maintenance has been observed, not only the physical structure of wires and poles must be considered, but also the use to which it is to be put, its remoteness or proximity to travelers on the highway, the nature of the electrical current which is to be transmitted over the line, the relative position of other lines, and all other circumstances affecting the case. The mere fact that the defendant is

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doing some criminal act at the time he is injured will not necessarily, as a matter of law, prevent a recovery from a defendant by whose negligence he has been injured. This rule is well settled. But looking to the question as to whether the plaintiff was in the tree in violation of law, we can not say that he was. * * * If the plaintiff stood charged with a violation of this ordinance, and the facts which appear in this record were before us, we would have to hold that he could not be convicted; because of his substantial compliance with the ordinance. His position is entirely different from that of the plaintiff in the Chapman case, *supra* for, according to the allegations there, the plaintiff came upon the premises of the defendant and put himself within the range of a dangerous instrumentality, for the avowed purpose of committing a crime. In the present case the plaintiff, with every intention of obeying the law and after substantial compliance with its terms, went, not upon the premises of the defendant, but upon the premises of a third person, the city, to do an act which was apparently legal, and which, so far as the relations between the parties are concerned, was affected with no illegality. The court erred in sustaining the demurrer." Cited, 7 G. A. 675.

In an action for damages on account of the homicide of the plaintiff's husband, under the pleading and the evidence the following facts appeared: The plaintiff's husband was in the employment of one of the defendant's patrons, and was charged with the duty of repairing shafting, machinery, "and the like." The defendant contracted to deliver into the plant of the company, where the plaintiff's husband, worked currents of 220 volts of electricity on a wire for supplying power and 110 volts on each of two other wires used for feeding electric lights. While engaged in his duties, the plaintiff's husband came into contact with the wire or the bulb on an extension-cord connected with a wire feeding one of the electric lights, and received a shock causing his death. The defendant carried on its primary wires, to a transformer located near the plant, a current of 2300 volts, said transformer being for the purpose of reducing the current to that which the defendant was to supply to the plant. Various acts of negligence were alleged to have been committed by the defendant, which resulted in allowing the wire with which the plaintiff came in contact to become charged with an excessive and deadly current, and with respect to its failure to provide suitable appliances whereby this

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could have been prevented. The jury found for the defendant, and the plaintiff excepted to the order of the court denying her motion for a new trial. Held: "Ordinary care" is a relative term, and the diligence which will amount to ordinary care varies according to the circumstances of each particular case. *Ryles*, 84/420 (11 S. E. 499). A power company in furnishing electricity to patrons, with respect to employees of the latter rightfully on the premises of the patron and likely to come into contact with wires carrying the current supplied, is bound to use ordinary care, which demands that the power company shall use such diligence in preventing injuries to such employees as is commensurate with the danger involved in the use and control of such a subtle and deadly agency as electricity. 1 *Thompson on Negligence*, § 804. The court charged the jury as follows: "If you find, under the evidence and the law as given you in charge, that the defendant was supplying electricity to the building in which the plaintiff's husband was employed and at work, and that the defendant exercised ordinary care in supplying electric current and in supplying such appliances as were in general use at the time of the death of plaintiff's husband, then the plaintiff could not recover. The defendant is not required to put in every latest device; it is only required to use the kind of machinery in general use and that is reasonably suited for the purpose for which it was intended; and you are to consider this at the time of the accident." The court gave the jury other charges of a similar nature. Such charges were erroneous, for the reason that it was a question for the jury to determine as to whether or not the defendant, relatively to an employee of one of its patrons to whom it was supplying electricity, had exercised ordinary care if it did not use the "latest devices," but only used "the kind of machinery in general use and that is reasonably suited for the purpose for which it was intended." The charge: "To render the defendant liable for such negligence as would entitle the plaintiff to recover under the law as given you in charge, the evidence must by a preponderance go further and show that the defendant knew of the defective condition of the wires, if any is shown, or of their operation if shown, or by the exercise of ordinary care, as explained, could have discovered it or corrected it," was not accurate, as it confined the negligence of the defendant for which a recovery might be had to "the defective condition of the wires * * * or of their operation," whereas there were other grounds of negligence involved. *Denson*, 135/132.

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AGAINST TELEGRAPH COMPANY.

539. Employee killed by the falling of a rotten pole.

The declaration set forth a cause of action against the telegraph company, the same alleging that the plaintiff's husband, an employee of the company, was killed without fault or negligence on his part, and wholly by the fault and negligence of the company; the homicide being caused by the falling of a rotten pole, which he had climbed in the performance of the duties of his employment, and its defective condition being unknown to him. If the declaration was defective in matter of form, in failing to allege that the company's negligence consisted in keeping the pole in use, either with knowledge of its condition, or negligently, without knowledge, this was matter for special demurrer. The declaration being good in substance, the court did not err in overruling a general demurrer thereto. *Wes. Union Tel. Co. v. Jenkins*, 92/398.

540. Against landlord by tenant.

The plaintiff's declaration showing that she received personal injuries in consequence of her landlord's negligence in failing to repair the rented premises, and it not appearing from the allegations of the declaration that she herself was guilty of such negligence (if any) as would entirely defeat her right to recover, it was error to sustain a general demurrer to the declaration. The question whether or not, under the circumstances stated in the declaration, she could, by the exercise of ordinary care, have avoided the injuries complained of, was one of fact for the jury, and not one for determination by the court. *Lumpkin, J., dissenting. Johnson v. Collins*, 98/271. Cited, 104/809; 111/150.

AMENDMENTS; GENERAL PRINCIPLES.

541. Amendments of pleadings, when allowed.

All parties, whether plaintiffs or defendants, in the superior or other courts, whether at law or in equity, may, at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form, or of substance, provided there is enough in the pleadings to amend by. The defendant after the first term can not set up new matter by way of amendment, except as provided in § 5640 (5057), Code, § 5681 (5097).

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Where a petition in an action of tort is brought against two defendants, and no service is perfected upon one of them, it may be amended by striking therefrom the one not served; and if this is done, without otherwise altering the language of the petition, all the substantial allegations of the petition will thereafter be read and understood as if there had been only one defendant originally. *Randolph*, 126/238.

A petition for damages, brought by a father, under the Code, § 4424 (3828), for the homicide of his minor daughter which alleges that the petitioner "has been and is unable to earn a support for his family without the assistance of his said daughter," may be amended by striking therefrom the words "his family" and inserting in lieu thereof the word "himself." *Henson*, 121/462. Cited, 123/30.

In a suit against a railway company to recover damages for the homicide of a passenger, it is proper to disallow an amendment to the plaintiff's petition when the allegations thereof need no amplification, and the only additional matter sought to be introduced by way of amendment is the assertion that the defendant company owed to the passenger a legal duty the non-observance of which could in no way have brought about or contributed to the injury of which complaint is made. *White*, 123/353.

A petition stating a cause of action, good as against a general demurrer, may be purged, by amendment, of general allegations which do not of themselves set forth a different cause of action but are inappropriate to the real cause of action declared on. *Inman & Co.*, 129/652.

Where this court has reversed the judgment of a trial court for not sustaining a demurrer to a petition, it is not too late, before the remittitur embracing the judgment of this court is acted upon by the court below, for the plaintiff to so amend his petition as to make it set forth a valid cause of action. *Miller*, 115/92. Cited, 121/420.

The court did not err in refusing to allow the amendment to the petition. While it is permissible, in an action based on negligence, to vary the specifications of negligence and to amplify the facts of which the alleged negligence is predicated, yet it is not permissible to introduce by amendment, into a petition containing only one count, allegations contradictory to the allegations originally set out in the petition and not stricken. *Flynt*, 7 G. A. 313. To the same effect, *Shepherd v. Southern Pine Company of Ga.*, 118/292.

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In Tice, 124/459, Mahala J. Tice and her husband, Charles Tice, jointly brought suit against the railroad company for injuries received by Mahala J. Tice while a passenger on a car operated on its railroad. The petition alleged, that she received permanent injuries, for which she claims damages in the sum of \$5,000. Charles J. Tice sues for the expense of doctors' bills, medicines, nursing, etc., to which she has been put, and for such future expenses as he will likely incur, and for the loss of her domestic services, as well as her services as a clerk in a business in which he was engaged at the time of her injury. At the trial term the defendant interposed a written demurrer and an oral motion to dismiss the case upon the ground that there was a misjoinder of causes of action. Each was overruled, and the defendant excepted. It was held that a petition which contains two distinct causes of action in favor of different plaintiffs against the same defendant is defective, but the defect may be cured by an amendment eliminating one of the plaintiffs and one of the causes of action. Such a defect is one of form and not of substance, and must be taken advantage of by special demurrer filed at the first term. When two causes of action against a defendant in favor of different plaintiffs are tried at one time, as a result of the failure of the defendant to raise the objection to the misjoinder of the causes of action at a proper time, and a verdict for one sum in favor of both plaintiffs is rendered, and no objection is raised, at the time the verdict is received, to the form in which the verdict is rendered, the irregularity in the form of the verdict is no sufficient reason for granting a new trial. The payment of the verdict as rendered to the parties jointly, or to their attorney of record, will discharge the defendant from liability to both of them on account of all matters alleged in the petition. Cited, 134/819.

Where a declaration has been demurred to in the trial court and the demurrer overruled and that judgment reversed by this court, upon the return of the remittitur to the lower court the plaintiff has the right to amend his declaration. Miller, 115/92. It is otherwise where the lower court has sustained a demurrer and that judgment affirmed by this court. In the latter case there is nothing in the lower court to amend. Patterson, 87/646. The ruling of this court when the case was here before was that there were not sufficient facts alleged to authorize the plaintiff to recover (Sudeth, 116/649); but there was enough in the declaration to amend

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by. The petition as amended was good against the general demurrers filed thereto. *City of Rome v. Suddeth*, 121/420.

542. Enough to amend by.

A petition showing a plaintiff, and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. The jurisdiction of the court may be shown, and the details and circumstances of the particular transaction may be amplified and varied by amendment. If the declaration omit to allege facts essential to raise the duty or obligation involved in the cause of action which was evidently originally intended to be declared upon, the omitted fact may be supplied by amendment. Code, § 5682 (5098).

Where a petition has been dismissed on general demurrer, and the judgment thereon has been affirmed, there is nothing to amend by; nor do the facts here call for the exercise of any discretionary power by this court to grant an order allowing the plaintiff to amend before the entry of the remittitur in the trial court. *Harp*, 119/927.

Where a judge sustained a special demurrer to a paragraph of a petition, with leave to the plaintiff to amend it in ten days, if no amendment was offered in that time, the effect of the judgment was to eliminate the objectionable paragraph from the petition; and thereafter the petition stood as if no such paragraph were contained therein. With the stricken paragraph omitted, it was alleged, that the plaintiff was employed by the defendant as a laborer in the erection of a building; that the master was bound to furnish him a safe place to work and reasonably safe appliances to carry on the work; that while he was at work in this employment, without notice or warning to him the wire rope used in connection with the derrick snapped, broke, fell, struck a platform under which plaintiff was working, and knocked down a portion of it so as to fall on the plaintiff, injuring him. In another of the remaining paragraphs it was alleged, that the plaintiff "was entirely free from fault in and about the manner of receiving such injuries which was caused by the negligence of the defendant company in having and using the defective, worn, strained, and broken rope in connection with the derrick, for the purpose of raising heavy loads of stone and other building material from the ground and to second and higher stories of said church building for use therein." Held, that there was in this last-mentioned paragraph a sufficient allegation of negligence on the

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part of the defendant to authorize an amendment amplifying such allegation. Whether or not this paragraph as it originally stood was subject to the objection that it contained allegations both as to freedom from negligence on the part of the plaintiff and the existence of negligence on the part of the defendant, and as not being an orderly and distinct paragraph, no such objection was made to it. As it stood, an amendment amplifying the statement of negligence on the part of the defendant was germane to such paragraph; and its rejection on the ground that it was not so germane, and a dismissal thereupon of the petition as insufficient, was error. *Beck, J.*, dissenting. *Blackwell v. Ramsey-Brisben Stone Co.*, 126/812.

A petition which, showing parties and the jurisdiction of the court, alleged that the plaintiff was an employee of the defendant, a mining company operating a mine; that he was ordered to prepare frozen dynamite for blasting; that while he was doing so a part of the dynamite caught fire, and an explosion followed which took off plaintiff's arms between the wrist and elbow; that plaintiff was following orders when he made the attempt to prevent the explosion; and that "the injury was occasioned by the fault and negligence of defendant as aforesaid and entirely without fault whatsoever on the part of plaintiff," contained enough to amend by, and was amendable in both form and substance. *Columbia Mining Company of Georgia v. Wellmaker*, 118/607.

In *Southern Bell Telephone & Telegraph Company v. Parker*, 119/721, there was a judgment of default. A motion was made to dismiss the petition on the ground that there was no allegation that the injury occurred in Macon County. The court permitted the plaintiff to amend by alleging that the injury occurred in Macon County and then the plaintiff insisted on the right to interpose its defense, which was denied. It was held, that the amendment to the plaintiff's petition, allowed by the court at the trial, did not materially change his cause of action, and therefore did not open the petition to demurrer or plea. *Turner, J.*, said: "The amendment to the plaintiff's petition, which the court allowed him to make at the trial, did not materially change his cause of action, but merely served to set forth facts disclosing that the court had jurisdiction to entertain his suit. Therefore the making of this amendment did not open the plaintiff's petition to demurrer or plea. Code, § 5652 (5068); *O'Connor v. Brucker*, 117/451."

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543. New cause of action and parties not allowable.

No amendment adding a new and distinct cause of action, or new and distinct parties, shall be allowed unless expressly provided for by law. Code, § 5683 (5099).

In *City of Columbus v. Anglin*, 120/785, Simmons, C. J., said: "Suit was brought by Mrs. Anglin against the City of Columbus, for damages for personal injuries. The petition alleged, that the municipal authorities had changed the grade of a certain street and put insufficient drains therein, so that the surface-water was allowed to pond near and upon the sidewalk and cause a washout, which the municipal authorities negligently filled with material which was not suited to the purpose and which they knew was unsuitable; that by these negligent acts the supports of a shed over the sidewalk were caused to settle, and, as a result, the shed, which was built of wood and in sound physical condition, fell upon the plaintiff and injured her. The petition also alleged that the plaintiff was entirely free from fault. To this petition the defendant demurred. The court overruled the demurrers, and the defendant excepted pendente lite. When the case came on for trial, the plaintiff offered to amend her petition by alleging, that the shed in question was dangerous and liable to fall, and that plaintiff had no knowledge of this fact and could not have ascertained the same by reasonable diligence; that it was defendant's duty to keep its streets safe, to inspect sheds over the sidewalks, and to remove such sheds as might be dangerous and liable to fall; that this shed had stood over the sidewalk for twenty years, and defendant had knowledge of its defective condition and liability to fall, or could have discovered the same by the exercise of reasonable diligence in inspecting; that defendant failed in this duty and 'permitted said street to be dangerous by allowing said shed to stand,' and that 'from said neglect of duty said shed fell in and upon the plaintiff and without fault or negligence upon her part, and injured and damaged her' in a named sum. The defendant objected to the allowance of this amendment, on the grounds that it came too late, and that it introduced a new and distinct cause of action. The court overruled the objections and allowed the amendment. * * * Amendments are allowed to cure defects. The original petition need not be perfect in either form or substance, but it should have in it at least enough to indicate some particular cause of action. 'Some transaction must be indicated, and some particular duty and breach in respect to that

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transaction must apparently be asserted by the declaration, and must be shown to exist by the amendment. If the plaintiff has two causes of action of the same class, though the same facts, may in part, be common to both of them, he is not allowed to declare upon one and afterwards abandon it and substitute the other by amendment.' Ellison's case, *supra*. He may, however, add further facts to more fully describe the cause of action,—the wrong,—which he originally alleged. He may allege additional facts to show the existence of his primary right, as long as he does not undertake to set up another and distinct right. And he may allege additional facts to show that the defendant has been guilty of the alleged violation of plaintiff's right. If there is substantial identity of wrong (which necessarily includes identity of the right violated), there is substantial identity of cause of action. This identity is not the same as that required between *allegata* and *probata*. A party is required to prove his material and essential allegations as he has alleged them, and, in the absence of amendment, may fail because of a variance, though the facts proved show substantially the same cause of action shown by the facts alleged. The two sets of facts may show substantially the same cause of action, and yet the proof of one will not sustain the allegation of the other. Not so with the test of an amendment. To avoid a variance is not the least important of the offices of an amendment. *Davis v. Hill*, 41 N. H. 329. So long as the facts added by the amendment, however different they may be from those alleged in the original petition, show substantially the same wrong in respect to the same transaction, the amendment is not objectionable as adding a new and distinct cause of action." It was held that where, in an action *ex delicto*, the petition sets out certain acts of negligence, to show a violation by defendant of the plaintiff's right, such petition may be amended by setting out additional acts of negligence to show substantially the same violation of the same right. Relatively to the law of pleading, a cause of action is some particular right of the plaintiff against the defendant, together with some definite violation of that right. No new and distinct cause of action is added to a petition by an amendment which contains additional matter descriptive of the same wrong pleaded in the original petition, and which does not plead any other or different wrong. *Wood*, 51/515; *O'Brien*, 73/655; *Henderson*, 73/718; *Cox v. Murphey*, 82/623; *Roughton*, 109/604, overruled in so far as they conflict with the above. Cited, 121/386. 463; 123/30; 128/605; 129/655, 692; 3 G. A. 541; 5 G. A. 671.

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In *Hunter, 128/600*, it was held, that a petition in a suit against a railroad company alleged that the defendant was the owner of the building which it used for depot purposes, and thereby invited persons having business to transact with the defendant to visit the same, and that the plaintiff went to the building for the purpose of transacting business with the defendant, and while there was injured by a defect in the floor of the building, which the defendant had negligently allowed to exist. An amendment was allowed which alleged that the defendant permitted the express company to carry on its business in the building, and that the post-office of the town was also situated therein, and that one person occupied all of the positions of railroad agent, express agent, and postmaster, and that plaintiff visited the building to transact business with such person as agent of the express company. Held, that the amendment did not set forth a new cause of action. Cobb, P. J., said: "The cause of action as originally alleged grew out of the ownership by the railroad company of the building, and its continuing it in a use which necessarily implied an invitation to all who had business with it to resort there for such purpose. The exact character of the business is not alleged. The character of the business that the owner or occupier of lands carries on therein is, in a case of the character now under consideration, material only in determining whether it is of a nature which implies an invitation to others to resort to such place. The use by a railroad company of a building for a freight and passenger depot is an implied invitation to any one who may have business with the company in its capacity as a carrier of freight or a carrier of passengers. * * * The liability of a railroad company as the owner or occupier of land, engaged in business, is the same as that of any person in like circumstances. *Gleason, 72/742*. * * * The amendment simply alleged that it permitted the express company to also transact business therein, and therefore invited people to visit the building for the purpose of transacting business with that company; and having allowed the government to use a portion of the building for a post-office, an invitation to the public to repair to the building for any lawful matter connected with the post-office department resulted. There was no change in the allegation as to the ownership of the building. In the amendment, however, the invitation was broader than it was in the original petition. In the original petition it embraced only one class: those who had business to transact with the company;

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in the amendment it embraced those who had business to transact with the express company as well as with the postmaster. The cause of action results from an injury to one who had been invited to the building by the defendant. The original petition alleged the acceptance of the invitation to visit the building for the purpose of transacting business with the defendant. The amendment alleged the acceptance of the invitation to the same building to transact business with a company which the defendant permitted to carry on business therein. The duty to keep the building in a safe condition was the same in each instance; that is, it was the duty owing to all who were invited there to transact business with the defendant, or with any one whom the defendant permitted to carry on its business therein. * * * The cause of action in the original petition rested upon the ownership of the building and devoting it to uses which impliedly gave an invitation to others to approach and use the same. The amendment simply alleged that the invitation was broader in its scope than that alleged in the original petition."

A petition alleged, that a man went to a railway station to assist his wife to board a train; that he helped her to enter the coach and carried for her a heavy valise, which she could not well lift; that this was done with the knowledge and consent of the conductor; that a reasonable time was not allowed him to leave the train, and that it started without giving any signal; that the train did not stop the usual length of time at that point; that the plaintiff, while proceeding to alight, reached the first step of the car, expecting that it would be checked in speed so that he might get off, but instead he was thrown by a sudden and violent jerk to the ground, thereby sustaining injury. An amendment was allowed, alleging, that while the plaintiff was standing on the step, the engineer saw him, and, instead of slackening the speed of the train, so as to enable him to leave it in safety, increased the speed and so managed the engine as to give a violent, unusual, and unnecessary jerk, throwing him to the ground and causing the injury; that the engineer was guilty of these acts with full knowledge that it was the purpose of the plaintiff to alight from the train; that the acts of negligence on the part of the defendant resulted in the plaintiff's losing his hold and being thrown to the ground. Held, that the amendment did not add a new cause of action. Clay, 130/563.

Where an action was based on the allegation that a passenger on a car of an electric railway, at the direction of the conductor,

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was required to change cars, and, while passing from one car to another, she was injured by the negligent conduct of the defendant's agents and servants in connection with such change, an amendment which alleged an additional act of negligence forming part of the same transaction did not set up a new and distinct cause of action. Such an amendment, which alleged that "said jerk of said car was caused by the defendant's servants and agents in charge of said car," was not subject to objection on the ground that it did not connect the alleged negligence with the defendant. If a car is at rest temporarily, and a passenger is lawfully leaving it, or passing from it to another car, under the direction of the conductor, and while this is in progress a sudden and violent jerk or movement of the car is caused by the company's agents, resulting in injury to the passenger, it is not necessary to allege in detail by what particular means they caused the jerk to occur. While an independent act of negligence not connected with, contributing to, or causing the injury to a passenger is immaterial, and an amendment alleging such an act is demurrable, yet where the amendment, taken in connection with the declaration, sufficiently shows that the act alleged in it formed a part of the conduct of the defendant's agents from which the injury was alleged to have resulted, there was no error in overruling a demurrer thereto. Where the evidence for the plaintiff in an action for damages tended to show that the injury occurred on the same line of railroad, but at a point some 350 or 400 yards distant from the place where it was alleged in the declaration to have happened, an amendment for the purpose of correcting the allegation so as to make it conform to the evidence, but still referring to the same transaction, and not to a different occurrence, did not add a new and distinct cause of action, and was not objectionable on that ground. If any objection could properly have been made to the allowance of such an amendment, it furnishes no cause for a reversal, where upon further evidence being introduced, which tended to show that the injury in fact occurred at the point originally alleged, the amendment was withdrawn. If a motion for a nonsuit should have been granted at the time when it was refused, yet if the evidence afterwards introduced supplied the deficiency, no reversal will result from such refusal. *Reeves*, 123/697. Cited, 5 G. A. 217.

Under the rule laid down in *Harris*, 78/525, when a petition against two railroad companies charges that the plaintiff's husband

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was killed, on a designated public crossing, by a passenger-train of the defendants, in consequence of the negligence of the defendants in divers named particulars, an amendment which alleges that, "without reference to whether the deceased was killed on or off the crossing, * * * he was visible on the track in the direction from which the train was coming at least 300 yards, and after the danger of the deceased became, or in the exercise of ordinary care should have become, apparent to the defendants' employees in charge of said train, such employees failed to exercise ordinary care, failed to give warning, failed to check or slow up, and thereby were guilty of gross and wanton negligence," does not introduce a new cause of action. Bradshaw, 113/862.

A petition alleging that fire, which the defendant railway company carelessly permitted to escape from its locomotive, ignited litter which the company had permitted to accumulate on its right of way, and spreading therefrom burned plaintiff's property, was amendable by alleging that the company "carelessly" permitted the litter to accumulate. Such amendment did not set up a new cause of action (*City of Columbus v. Anglin, supra*), nor add a second count to the petition. The words "carelessly" and "negligently" are synonymous. The cause of action alleged in the original petition was the negligent destruction of cotton deposited at a particular place, by fire set out by the defendant's negligence. It was amendable by adding a more specific description of the cotton, and an amplification of the acts of alleged negligence on the part of the defendant. *Inman & Co.*, 129/652.

In *Lyons*, 5 G. A. 668, it was held that "the true criterion for determining whether an amendment is admissible is this: whether the amendment is of another cause of controversy, or whether it is the same contract, or injury, and a mere permission to lay it in a manner which the plaintiff considers will best correspond with the nature of his complaint, and with the proof and the merits of his case. The plaintiff can not introduce an entirely new cause of action; but if he adhere to the original cause of action, he may add a count substantially different from the declaration." The plaintiff alleged "that the engineer, instead of starting the said engine at a slow rate of speed and gradually increasing same, in a negligent manner caused said engine to start off at a high rate of speed with a sudden, unusual, unnecessary, and violent lunge or jerk, causing the car upon which petitioner was riding to give a

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sudden, unusual, unnecessary, and violent lunge or jerk, and throwing petitioner violently to the ground with his left leg upon the track when said engine ran over and crushed said leg. * * * That petitioner was entirely without fault, having in no way contributed to said injury; but said injury was caused solely by the negligence and carelessness of the engineer of said company in causing said engine to give said sudden, unusual, unnecessary, and violent lunge or jerk." The amendment was to the effect that the engineer was incompetent. Russell, J., said: "The gist of the action is that the plaintiff's injury was due to the engineer, and especially to the way in which the engineer acted on the occasion in question. * * * It seems to us that the allegation that the engineer was incompetent is merely an amplification of the original allegation of negligence relied upon; for it is not upon the negligence of the engineer as an individual, but his negligence as a servant of the defendant company—and, therefore, its negligence—that the plaintiff must at last depend for recovery. Unless the company is in some way chargeable with the engineer's negligence, the company would not be liable. The negligence of the company is the question finally to be determined, and the negligence or incompetence of the engineer as a servant of the company must be imputed to the company before the defendant can be said to have been negligent."

An amendment to the petition, which merely varies the acts of negligence, but which does not complain of any different wrong or injury from that set forth in the original petition, is not subject to the objection that it sets forth a new cause of action. King, 1 G. A. 88.

An amendment to the petition which merely amplifies or varies the acts of negligence from which it is alleged an injury resulted is not subject to the objection that it sets forth a new and distinct cause of action. Southern States Portland Cement Co. v. Helms, 2 G. A. 308; 4 G. A. 167; 5 G. A. 673. This case again, 6 G. A. 153.

Where in an action against a railway company for personal injuries the plaintiff seeks to recover on the theory that the employees of the defendant "forcibly and violently removed her from a moving train, in reckless, if not wanton, disregard of her rights and safety," a new cause of action is not added by an amendment which alleges in effect that the plaintiff voluntarily alighted from the moving train with the assistance of the defendant's employees, and that

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on account of the fact that the train was moving and by reason of the manner in which she was assisted to alight she sustained injury to her person. Fish, P. J., said: "The cause of action was the same as that declared on in the original petition, to wit, the wrong done the plaintiff by negligently injuring her in the manner in which she alighted from the train. Or, to state it differently, the plaintiff had a right to disembark safely from the train. The wrong consisted in violating this right. The manner in which it was violated was a minor fact and might be changed by amendment. New charges of negligence could be thus added if they contributed to or related to the same wrong. Horine, *supra*. The amendment sought merely to change the description of the details or minor facts of the transaction. It did not change the main fact. The wrong in each case was the same. A plaintiff may in different counts of a petition set forth the same cause of action in as many different ways as he sees proper." Burnham, 123/28. Cited, 130/598.

In Lyndon, 3 G. A. 534, the plaintiff alleged that, "the car which petitioner boarded was so crowded that all of its seats were occupied, and petitioner found it necessary to stand up in the aisle of the car and hold on with one hand to the back of the seat, to steady himself. His position was in full view of the conductor and was well known to the conductor, and the conductor saw him while occupying this position, which is usual and customary on the cars of the defendant when all the seats are occupied. The car stopped at Simpson street for the purpose of taking on or letting off passengers, and then started forward, continuing its way out Marietta street. After it had started and while it was running slowly, it gave a sudden, violent, negligent, and careless jerk forward, and petitioner was thrown to the floor and seriously and permanently injured. Petitioner was injured through the negligence of defendant, which consisted in jerking said car suddenly, violently, negligently, and carelessly." Russell, J., said: "We think the court erred in refusing to allow the amendment offered by the plaintiff; for certainly, in so far as paragraphs 2, 3, 4, 5, 6, 7, and 10 are concerned, the stricken portions of the amendment which was filed, as well as the proffered amendment, set up, as a distinct act of negligence, the fact referred to in the original petition, but not then alleged to be negligent, namely, the overcrowding of the car and the failure to furnish the petitioner a seat. This fact, although an

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independent breach of public duty, could be alleged as negligence contributing to the injury, and did not set up a new cause of action. Anglin's case, 120/785 (5), (48 S. E. 318)." It was held that the refusal of the trial court to allow the proffered amendment to the plaintiff's petition cut off a part of the case which he had a right to set out in his petition. It debarred him from relying upon a ground of recovery, by preventing him "from placing before the jury at all a substantial allegation of duty violated, constituting negligence, on the basis of which a recovery was claimed."

An amendment which sets forth an act of negligence additional to others originally pleaded as being a concurring and contributing cause of the injury, for which damages are asked in the original petition, does not add a new and distinct cause of action. Adams, 129/688.

In an action for a tort alleged to have been committed by the defendant to the plaintiff's person, it is not error to allow an amendment claiming exemplary damages, in which it is in effect alleged that the act complained of amounted to willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Jordan, 129/665. Cited, 6 G. A. 648.

In a suit in the justice's court for the value of stock killed by the defendant railroad company, an amendment by the plaintiff, stating that the value of the stock killed was \$60, instead of \$50, was properly allowed. Code, § 5681 (5097); Ellison, 87/691; Clark Adm'r, 1 G. A. 235.

In Ansley, 8 G. A. 327, it was held that mere error does not require the grant of a new trial. To set aside a verdict sustained by evidence, the error of which complaint is made must be shown to have been injurious to the complaining party, or at least appear to have affected some of his rights. Where the plaintiff in an action for damages placed his right to recover upon a statute of Alabama, it was not error harmful to the defendant to refuse at the second term to allow an amendment to the answer, setting forth that the train upon which the plaintiff was employed, and upon which he was injured, was engaged in interstate commerce, and that therefore the defendant, if liable at all, was liable under the provisions of the act of Congress, approved April 22, 1908, generally known as the "employer's liability act." Even if this act of Congress, as to such a case, superseded the statute of Ala-

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bama, and even though the amendment would have been good if filed at the appearance term as a dilatory plea, it did not set up any substantive defensive matter affecting the merits. And as the rights of the plaintiff as an employee were greater and the liabilities of the defendant as an employer were less, under the statute of Alabama, than under the statute of the United States, the refusal of the amendment could not by any possibility have injured the defendant. Even if the statute of the United States had been applied by the court, and the jury instructed accordingly, the verdict in favor of the plaintiff would have been demanded. Under the provisions of the Federal "employer's liability act," the evidence demanded the verdict. Dilatory pleas must be filed at the first term. Russell, J., said: "Paramount to every other consideration is the rule which requires that injury shall concur with error, before the finding of a jury should be set aside. We bear in mind the rulings in *Exposition Cotton Mills*, 83/441 (10 S. E. 113), and *Bolton*, 83/659 (10 S. E. 352). These rulings, however, we deem to have been overruled and disapproved, or at least greatly limited, by the rulings of the Supreme Court in *Ellison*, 87/691 (13 S. E. 809), and *City of Columbus v. Anglin*, 120/785 (48 S. E. 318)."

544. What facts may be supplied by amendments.

Under the Code, a declaration which has all the requisites to make it good and sufficient in substance, save that it omits to allege some fact essential to raise the duty involved in the cause of action which the pleader evidently intended to declare upon, is amendable by supplying the omitted fact at any stage of the case. Thus, where the duty claimed was the duty of forbearing to obstruct a sewer-pipe which conveyed waste-water from the plaintiff's premises and discharged the same on the defendant's land, the declaration was amendable by alleging an easement subjecting his land to the burden of receiving the water so discharged. Also, in an action by a mother suing for the homicide of her son, where the fact omitted from the declaration was that she was dependent upon him for a support, the declaration was amendable by alleging that fact. *Ellison*, 87/691. Cited, 87/764; 88/286, 537; 89/827; 90/697; 92/711; 95/678; 102/260, 773; 106/128; 107/42; 8 G. A. 327. The amendments which are allowable under the authority of *Ellison's* case are those which simply make perfect a cause of

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action which is imperfectly set forth in the pleading sought to be amended. *Davis v. Muscogee Mfg. Co.*, 106/126. Cited, 120/258.

545. The particulars may be amplified and varied.

In *Harris*, 78/525, it was held that the cause of action alleged being the homicide of plaintiff's husband by means of the defendant's negligence, the allegations in the declaration touching the specific acts of negligence, and the manner of causing death may be varied or added to by amendment during the progress of the trial so as to adapt the pleadings to the evidence in all its aspects. In this case there was enough in the declaration to amend by; the amendment did not introduce a new cause of action. *Bleckley, C. J.*, said: "The substance of the original declaration was that the plaintiff's husband was killed by the running of the defendant's train, locomotives, cars, and other machinery. His death was the result of no negligence on his part, but was due to the negligence of the defendant. It was the result of failure by the defendant to use any of the precautions required of railroad companies at public crossings; and to use reasonable care to prevent injury to passers-by at Pryor street crossing, where he was killed. An amendment prior to the one excepted to had been made, which alleged in substance this: The railroad crosses Pryor street, and goes to the end of the car-shed. The engine started on the edge of the sidewalk, and across the walk and street, without ringing the bell or giving any sufficient signal of an intention to start. It started and ran too rapidly, and the circumstances were such as to require special care by the defendant; but the defendant failed to exercise ordinary care, or any care, and this negligence caused the homicide. The amendment finally made, and the one excepted to, was in substance as follows: The defendant failed to furnish a safe way for egress from the cars, in this: it placed an iron rail around the platform of a car, and did not provide steps to another car next to the former, nor proper rails for the protection of persons on the steps. A number of persons were upon the latter car, bidding friends good-by. They were there by permission, express or implied, of the defendant, and were negligently urged by the defendant from the car, and while they were getting from it the train started, the conductor not allowing sufficient time for those persons to descend, nor did he stop the train or use any care to prevent an accident, though he saw a crowd endeavoring to get

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off, and saw that the plaintiff's husband, in climbing off the platform, had fallen between the cars, and was hanging to one of the posts of the railing. These acts were gross negligence on the part of the defendant, and caused the death of the plaintiff's husband, who was on the train by the defendant's permission, and was in the exercise of due diligence. The cause of action was the homicide of the plaintiff's husband by the negligence of the defendant. In setting out that negligence, it was described in one way in the original declaration, in another by the first amendment, and in another by the second amendment. But it was all the same cause of action. It might be tested thus: Suppose it were lawful to amend indictments for murder, and you had an indictment for the murder of A. alleging that it was by shooting, and the proof disclosed that it was by stabbing, could an amendment alleging that it was by stabbing be thought to charge another and different crime? The crime in the supposed case would correspond to the cause of action in this. Would it be charging the defendant with another crime to add another count, or to allege in the same count that the death was the result of stabbing, or other means than shooting—the means first charged? We think not. There can be but one cause of action for the homicide of any one man, and all these variations went to the means and mode by which the homicide was perpetrated; and the present case is a good illustration of the propriety of at least a discretionary power of allowing such amendments; because, as the plaintiff understood her case and proved it, the homicide was the result of an occurrence at the crossing, separated altogether from the cars and the condition of the cars. But the defendant introduced evidence of which probably the plaintiff had no knowledge or information before, tending to show that the killing occurred in consequence of the husband being upon the train and attempting to get off, and exposing himself, or becoming exposed, while in the act of alighting. It would be a great hardship to make this action fail because of the difference and the doubt as to how the death really came to pass, provided that it was the result of defendant's negligence. It was a proper case for amendment, and it would have been an abuse of the law of amendment had this amendment been disallowed." Cited, 83/88; 86/630; 106/127; 107/42; 113/862; 123/702.

An amendment which merely amplifies and explains more fully the original cause of action is allowable. Mosely, 112/914.

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546. Subject continued.

Where the homicide is alleged, the mode of committing it may be particularly specified by amendment without adding a new cause of action. *Kitchens*, 83/83. Cited, 106/128; 107/42.

A declaration, filed by a track-hand of a railroad company, alleging that plaintiff was injured by a fall of earth, caused by the negligence of the company, its agents and servants, is amendable by setting out the particulars constituting the alleged negligence, and also by averring that plaintiff himself was without fault. The declaration as amended, sets out a cause of action, although it does not distinctly allege that plaintiff was ignorant of the danger to which he was subjected. *Smith*, 87/764.

The particulars set forth in a declaration by way of inducement, and as preliminary to the main facts constituting the plaintiff's cause of action, may be varied by an amendment so as to accommodate these allegations to the evidence expected to be adduced. *Christian*, 90/124.

In *Murden*, 83/753, it was held that it being apparent from the original declaration that the cause of action was the expulsion of a passenger from the cars because he refused to pay an alleged overcharge, consisting of the difference between the ticket rate and the conductor's rate, an amendment showing more fully why a ticket was not, and could not be, procured was allowable; and the explanation being that there was no agent at the station to furnish a ticket, the declaration as amended was sufficient. Cited, 114/288; 128/638.

The action being by an employee against his employer for personal injuries alleged to have resulted from defective machinery and appliances, which the employee was using in the line of his duty, the declaration is amendable, at the trial, by varying and amplifying the particulars in respect to which the machinery was defective, and in respect to the manner in which the injuries were inflicted, the amendment evidently relating to the same occasion, the same occurrence, the same injuries, and the same machinery referred to in the declaration. No new cause of action is introduced, either with reference to the statute of limitations or any other rule of law. *Colley v. Gate City Coffin Company*, 92/664.

547. Subject continued.

In *Cartter v. Cotter*, 88/286, the plaintiff alleged that he was

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ordered by the foreman to work at a certain windlass, which was being used in drawing a pile out of the water below and under the place where he stood and was required to stand. The windlass was defective, and in bad order, in that it had no "dog" or brake on it whereby it could be controlled and managed by the man managing it, so that when the pile was lifted up by the man at the windlass he had no control of the same except to hold it up by main strength. While petitioner was so drawing up the pile at the windlass as stated, by reason of carelessness and negligence on the part of defendants and their tackle, machines, and workmen managing said pile, it slipped from its moorings, and, by reason of the windlass having no dog or brake the handle thereof was jerked out of petitioner's hand very swiftly and violently, and, rapidly revolving, struck him on the shoulder, knocking him down; that he was injured by the negligence, carelessness, and indifference of defendants by doubling work on their employees, and furnishing defective machinery, and requiring them to use it; and that they and their agents well knew the defective condition of the windlass, and were responsible for the injury. Plaintiff was allowed to amend by alleging he was informed by the foreman that the windlass and all the machinery were safe and in order. He, petitioner, was wholly unacquainted with the machinery, and did not, of his own knowledge, know whether it was safe or unsafe, and relied upon and trusted the declaration of defendants and their foreman; nor did petitioner know how many men were required to manipulate and work the machinery. At the time petitioner was injured the foreman took hold of the windlass with him, and together they drew up a heavy log, and when they had wound it partly up the foreman was called off, and left petitioner alone to hold the windlass, and it was impossible for him to abandon his hold upon it; and while he was thus holding the windlass the log to which it was attached gave way, and fell with its full weight upon the rope, and jerked the windlass from his grasp, and thereby injured and damaged him. He did not know of the defects in the machinery, nor that defendants were working with an insufficient number of hands, until after he was injured; and defendants, well knowing that said machinery was defective and dangerous, neglected to repair and continued to use it. Plaintiff was afterwards allowed to amend as follows: He was a common laborer, and was employed by defendants to do common manual labor on the bridge.

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Defendants neglected to furnish for the use of their employees adequate, suitable, and safe machinery and tools, and neglected to inspect and keep in repair the machinery and tools furnished. They furnished to and for the use of plaintiff a machine, commonly called a "crab," which was defective, broken, out of repair, and dangerous, in that it had no dog, and was unfit for the use and service to which it was put. Plaintiff was not a mechanic and was not acquainted with the construction and necessary parts of the crab, and had no notice that it was defective or dangerous. Defendants knew it was defective and dangerous and did not notify plaintiff nor repair it, but knowingly permitted plaintiff to use it. It was held that under the ruling in *Ellison's case*, the declaration in this case was amendable, the amendments were properly allowed, and no new cause of action was introduced. Cited, 8 G. A. 622.

A declaration against a railroad company for the homicide of plaintiff's husband, which alleged, after describing the manner of the homicide, that the acts complained of constitute gross negligence on the part of the company, its agents, servants, and employees, and that said gross negligence caused the death, was amendable by striking therefrom an allegation that "the engineer on said engine was looking, not at the track in front, but towards the fireman, who was on the opposite side of the engine," and inserting an allegation that "said engineer could have seen said Barnett and lumber, and did see them, in time to have stopped before reaching them, but failed to do so, and failed to give any signal, and made no effort to stop before reaching said lumber and said Barnett." Both before and after being amended, the declaration in this case set forth a cause of action. The amendment did not introduce a new cause, but only varied the statement of particulars of which the cause of action, to wit, the homicide of the plaintiff's husband, consisted. Under the declaration and the evidence, the plaintiff could recover only in case the homicide was willful on the part of the company's engineer, or the result of such gross negligence and recklessness as would be equivalent to a willful homicide. *Barnett*, 89/718. This case again, 94/447.

Where the declaration alleged that the employees of a railroad had violently, unnecessarily and improperly blown the whistle of the engine, thereby frightening the plaintiff's horse and causing him to run away and injure the plaintiff, it could be amended by setting

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out more fully and distinctly the circumstances and facts of the tort. Such an amendment did not add a new cause of action. It charged in substance the same tort as originally complained of. Thomas, 68/744.

548. Subject continued.

In Andrews, 89/653, the declaration alleged that there was in the city of Augusta a system of electric wires operated by the defendant, the Augusta Railway Company; there was also another system, consisting of the fire-alarm wires of the Augusta fire department; and the plaintiff was employed in putting up wires for a third, that of a telephone company. In stringing the wires on the poles, it became necessary at a certain point for the plaintiff to place the telephone wire above and across the fire-alarm wire, and for that purpose he ascended a pole of the fire-alarm system to the height of the wire, and, while attempting to place the telephone wire over and across the fire-alarm wire, received from the latter a shock which caused him to fall to the ground, a distance of some twenty-three feet, by which means he was seriously injured. He charges that his injuries "were caused solely by the carelessness of the defendant company in so negligently constructing, using, and operating what is known as its 'feed-wire' as to permit and allow the same to come in contact with said fire-alarm wire, at the intersection of" two named streets of the city, "and negligently and carelessly failing to separate, and keep separate, at a safe and proper distance, its said feed-wire and said fire-alarm wire, at the time and point indicated; that there was being transmitted over said feed-wire, at the time petitioner received said injuries, a powerful and deadly current of electricity, used to propel the cars of defendant, which current was carried over said fire-alarm wire from said point of contact to the place where petitioner was working as aforesaid, and thence into and through his body;" and that the "fact of contact of said feed-wire and said fire-alarm wire was known, or by proper diligence might have been known, to the defendant." It was held that the plaintiff's declaration, not alleging that he had permission from the owner of the electric system, on which he had entered at the time he was injured, to come in contact with its wires or to climb its pole in the prosecution of his business for another company, or that the defendant knew of his presence at the scene of the injury, which was up in the air, some

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twenty-three feet or more from the ground, the declaration set forth no cause of action, and a general demurrer thereto should have been sustained. Simmons, C. J., said: "The plaintiff does not allege any fact going to show that the defendant company was under any duty or obligation to protect him at the time or place of the injury. He does not allege that he had permission from those operating or in charge of the fire-alarm system to climb its poles in the prosecution of his business. Without permission, and without notice even, so far as appears from this declaration, he climbed the pole, and became a trespasser upon the fire-alarm system. He had no right to go upon the pole without permission, and when he did so he took the risk incident to the trespass. If he had obtained permission from those in charge of the fire-alarm system to climb their poles to carry on his business, he would have been in a position somewhat analogous to that of a servant of the licensors, and if, while acting in pursuance of the license, he had been injured by the negligence of the railway company, he might be entitled to recover. Or if he had been upon the street, or in any place where he had a known right to be, and had been injured by the negligence of the railway company, he would be entitled to recover. Whatever may be the reciprocal duties of electric companies between themselves, as to guard-wires, etc., each must see to it, up to the measure of full diligence, that the public is protected, upon the streets from the danger of contact with its wires when charged with the deadly electric fluid. If a person, however, leaves his proper place in the street, or highway, and climbs a pole twenty-three feet high, which supports an electric wire, taking with him a wire to throw across the one on the pole, and does this without permission from the company whose system he has thus entered upon, and, by reason of the contact of that company's wire with the 'feed' wire of another company, is injured, he can not recover from either company. If the plaintiff had given the railway company notice that he was going up the pole, or if it had reasonable grounds to believe that he was on the pole, and it had known or ought to have known that its wire was in contact with the other wire, it might be liable to him for injuries received by him on account of its negligence." Cited, 97/666. The declaration was amended afterwards, and it was held that the amendment did not set up a new cause of action, but, by its allegations, it amplified, enlarged, and made complete the same cause of action intended to

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be set forth in the original declaration, and relieved it of the main defect upon which it was adjudged to be insufficient, by alleging facts showing that the plaintiff, when injured, was not a trespasser upon the fire-alarm pole, but was there by the permission of its owner, and that his presence there should have been anticipated by the defendant. The allegation that permission to climb this pole had been granted the plaintiff by the "city council of Augusta, through its duly authorized officers and agents," was sufficient, without stating the name of any particular official or agent of the municipal government. *Andrews*, 92/706. Cited, 94/435; 101/847; 122/668; 2 G. A. 611; 3 G. A. 171.

549. Subject continued.

A suit for damages resulting from the careless and negligent running of defendant's engine may be amended by setting out negligence in not discovering and remedying defects on the machinery of the engine, which, by the use of ordinary care and diligence, could have been discovered and remedied so as to prevent the accident. Such amendment does not add a new cause of action. This declaration alleged that plaintiff was injured "by reason of the unskillful, careless, and negligent running of the engine and cars." The amendment was this: "That besides the unskillful, careless and negligent running of said engine and cars, the said defendant is further guilty of negligence in this, that the draw-bar on the pilot of the engine then and there being used, upon which your petitioner was standing in the due and proper discharge of his duty, and without fault upon his part, was defective, which defect was not known to your petitioner at the time of the injury aforesaid, and not discoverable by him in the reasonable and ordinary exercise of diligence in the course of his duty, and that said defendant was careless and negligent in not discovering said defect, as it was its duty to do, or in failing to remedy the same." *Dorsey*, 68/228.

In the case of *Schmidt v. Block*, 76/823, the declaration alleged that plaintiff was employed to labor in defendant's cracker and candy factory, and he undertook to place a barrel of syrup in a steam elevator, and while engaged in the act, and before he released his hold of it, the elevator was improperly put in motion whereby the barrel was thrown upon him and he was injured; that the defendant failed to provide and furnish suitable catches, stops

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or locks for the elevator, or competent skilled persons to watch or run it, and by reason of such failure he was injured. The declaration was amended by alleging that defendant's business was complex and dangerous, and he failed to prescribe rules sufficient for its orderly and safe management; that the elevator was prematurely and recklessly put in motion by the negligence of defendant in failing to provide sufficient locks and stops and guards to hold and make secure and safely run it. On demurrer it was held that while the original declaration was confused and not as plain and distinct as the law requires, yet the amendment set up clearly two causes of action, and that when knowledge is essential to charge the master, negligent ignorance is equivalent to knowledge.

The original declaration alleging that plaintiff's husband was killed by the gross negligence of the agents of defendant in running its cars, etc., there was enough therein to amend by; and an amendment alleging that he was on the railroad-track where persons were accustomed to walk, that he was between the blow-post and the crossing on said track, and that the agents of said company failed to give any signals or to blow its engine as required by law, and that they, without any fault on his part, did by said negligence run over and kill him, to his injury, made the declaration sufficient to authorize a recovery, if supported by evidence. *Denson*, 83/266.

Where, in an action against a railroad company, the petition of the plaintiff claims damages for pain and suffering occasioned by a personal injury that had resulted from the negligence of the defendant, it is not error for the court to allow an amendment, at the trial of the case, to the effect that plaintiff still suffers pain from the injury, especially when it appears that the court allowed the amendment and proof thereunder for the purpose of illustrating the extent of the pain and suffering, and not for the purpose of showing any permanent injury. *Lake*, 112/244.

A petition which alleges that a railway company, "by the use and running of their engines, locomotives, or other machinery, or otherwise, by the negligence of their agents, employees, or servants, set fire to and destroyed" the plaintiff's property, is amendable by the addition of a paragraph alleging that the fire in question was caused by the negligence of a section foreman in the employment of the company, and by setting forth the particulars as to the origin of the fire. *Ward*, 110/793.

There was enough in this declaration to amend by. Though in

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suits conducted by a next friend, the minors ought regularly to sue by him, yet, if the next friend sue in behalf of the minors, it is the same in substance. The defect in form is amendable by alleging that the minors sue by their next friend. A declaration at the suit of children for the homicide of their father is amendable by alleging that the deceased left no widow, and that the plaintiffs are all the children which survived him. Van Pelt, 89/706. Cited, 93/55.

A declaration, brought by a father to recover "for the services," during its minority, of a minor child, negligently killed by a railway company, in which it was alleged "that, as she advanced in years, her services would have become of great value to him," though it does not distinctly aver at the time of the killing the child was capable of rendering services of any value, is amendable by alleging that the child was old enough to render, and did in fact render, certain specified services, and the same were, at the time of her death, of a stated value per month. Sugarman, 94/604. Cited, 106/879.

An action by a father "suing for the use" of his minor son is in substance a suit by the son. Especially is this true where the allegations of the petition, taken as a whole, clearly show that the cause of action arises solely from injuries received by the son, and that the father seeks to recover damages exclusively for the son on account of such injuries. While the more regular form is for the minor to sue by next friend, it is the substance of the suit, and not its technical form, that must determine its true character. Even if the petition in this case had been defective in form, leaving doubtful who was the real plaintiff, it was amendable in this respect, and the defect was cured by the verdict. Vale Royal Manufacturing Co., *et al. v. Bradley*, 8 G. A. 483.

550. Amendment setting out a foreign statute.

Where, in a suit brought in Georgia under a South Carolina statute which allowed the administrator of a decedent who left a parent or wife or children to sue for his homicide, the declaration failed to allege that he left such parent, wife or child, it could be amended. It could also be amended by setting out the South Carolina statute. There was enough in this case to show that the plaintiff relied on the statute. Nix, 68/572. Cited, 83/660.

In Bolton, 83/659, the plaintiff relied upon a common-law right, which renders the employer liable for knowingly furnishing defect-

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ive material to its servants, whereby they are injured. He averred all the facts required by the Alabama statute, but the statute was not mentioned, nor intimated, in the declaration, and he offered to amend by declaring on the statute which gives employees a statutory right to recover upon other grounds. The amendment was rejected on the ground that it added a new cause of action. Such an amendment might be made if the statute was invoked though defectively—if the plaintiff, in some way, shows that he relied on the statute—in the original declaration. See 8 G. A. 327.

Where a plaintiff relies, as an act of negligence authorizing a recovery, upon the breach of a duty imposed upon a railway company by a statute of a foreign State or by an ordinance adopted by a municipality thereof, it is incumbent on the plaintiff to specially plead the statute or ordinance; and in the absence of proper pleading, proof in regard thereto is inadmissible. Evans, 121/391.

In Lyons, 5 G. A. 668, it was held that a general demurrer to a plaintiff's petition may properly be overruled where the invoked legal conclusion that he has no cause of action must depend entirely upon the court's knowledge of the law of a foreign State, and is not supported by that law. Where the law of a foreign State is known and properly administered by the trial judge, his judgment will not be reversed. Especially is this true where the demurrer does not make the point that the foreign law on which the plaintiff's cause of action is based is not pleaded by him. Russell, J., said: "The judge had the right to apply his knowledge of the law of South Carolina, and the construction given that law by the court of last resort in that State, and had the right to hold, as a matter of law (when the decision of the lower court was invoked by demurrer upon a matter of law), that, as construed by the Supreme Court of South Carolina, the plaintiff was not a fellow servant with the engineer of the train. If a statute has supplanted the common-law in South Carolina, our courts should, as a matter of judicial propriety (as pointed out in Sasser, 4 G. A. 276, 61 S. E. 505), adopt the construction placed upon the statute law of a sister State by its court of last resort. We can not hold, therefore, that the court erred in overruling the general demurrer, upon the ground that the common law prevails in South Carolina, in an action brought against a railroad company by such an employee as the plaintiff. But inasmuch as it is necessary, in order to constitute a properly pleaded cause of action as to an injury

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occurring in South Carolina, that the plaintiff's right to sue under the laws of that State should be specially pleaded, and the statute giving the right should be at least substantially set forth, we affirm the judgment, with direction that the plaintiff amend his petition by declaring upon the provision of the law of South Carolina upon which he relies for recovery; and that if he fails to do this, the petition be dismissed."

551. New and distinct cause of action.

When a declaration claimed damages, on the ground that defendant had unlawfully dug a hole or ditch at the junction of a shell-road and a village road or path leading thereto, into which the plaintiff fell, it could not be amended by seeking to recover because the defendant had removed a certain plank crossing erected by it over a ditch or hole, by reason of which the plaintiff fell into the ditch. The amendment introduces a new and distinct cause of action. *O'Brien*, 73/655. Cited, 109/606.

Where a declaration claimed damages by reason of the plaintiff's having fallen into a well situated on the right of way of a railroad, and which had been carelessly left open and unguarded, an amendment which alleged that the well was on the land of the plaintiff, and that the defendant entered on the plaintiff's land without the plaintiff's knowledge or consent, and cut away the vegetable guards and protection around the well, sought to introduce a new cause of action and was properly rejected. If not so, the amendment was immaterial. The same case was made by the original declaration as would have been made by amendment, and its rejection did no injury. The same testimony was admitted as would have been admissible if the amendment had been allowed, and no right was denied the plaintiff by its rejection. *Henderson*, 73/718. Cited, 73/657. Overruled, 120/785.

In *Cox v. Murphy*, 82/623, it was alleged that plaintiff was attacked in the streets of a city by a wild and furious steer, the property of defendant; that defendant knew the animal was furious, dangerous, and had a propensity for attacking persons, but attempted to drive it through the streets. Plaintiff amended, first, by alleging that defendant carelessly kept the steer, well knowing that it was accustomed to attack, gore and trample mankind, and while so keeping it, it attacked the plaintiff; second, by alleging that defendant so negligently kept the animal that it escaped and un-

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lawfully came upon the street and injured the plaintiff; third, by alleging that defendant kept a vicious steer, which was known to defendant, which by the careless management of defendant in attempting to drive it along the street, was allowed to escape and go at liberty, upon which it attacked the plaintiff. It was held that the first and third amendments were properly allowed, as they both alleged that the steer was wild and vicious, and that this was known to defendant, and it was error to allow the second amendment. It contained a new and distinct cause of action. It did not allege that the defendant knew the animal was vicious, or even that it was vicious. Under the original declaration and first and third amendments it was necessary to prove the scienter of the defendant; under the second amendment this was unnecessary. Cited, 109/606. Overruled, 120/785.

A declaration sounding in tort, against a railroad company for violation of its duty as a common carrier, is not amendable by converting it, in whole or in part, into an action upon contract to carry. Where the declaration sets forth a cause of action, and lays damages in general terms, it is not vitiated by a clause which sets up that "the entire injury is to her peace, happiness and feelings," although this theory of the injury be incorrect. The action is maintainable for the real injury embraced in the facts set out in the declaration. Cox, 87/747.

In Williams, 105/70, it was held that where one brings an action against a railway company for injuries he sustained growing out of the defective construction of a platform upon which he was engaged at work as an employee and servant of the company, such a suit can not be converted into an action against the railway company, as owner of the premises where plaintiff was hurt, and as landlord of the plaintiff's employer. Simmons, C. J., said: "The gist of the action as first instituted was that the master had negligently failed to provide plaintiff a safe place on which to do the work for which he was employed. These duties grew out of the contract relationship between the master and the servant. When the amendment was made and allowed, it changed the whole character of the action. Plaintiff then depended for recovery upon the obligation of the landlord to his tenant and the tenant's servants to keep the premises in repair. The two causes of action are quite different, and the rules governing the obligations of the master and of the landlord under such circumstances are also different.

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In the one, a legal obligation is upon the master to provide a safe place for his servant to work; in the other, the obligation is that of a landlord to keep his premises in repair so as not to injure his tenant or his tenant's servants." Doubted, 128/605.

In *Davis v. Muscogee Mfg. Co.*, 106/126, the plaintiff alleged that he was employed to clean and wash window-glass in defendant's factory, and while so engaged, the engineer, or some other employee of the defendant operating the engine of the factory, without warning to the plaintiff and without his knowledge, turned on the steam from the engine, so carelessly and negligently that the water and steam went outside of the factory to the window plaintiff was washing, and thereby, without any fault on his part, scalded and burned him. An amendment was offered alleging that the defendant was negligent, in that it kept and maintained a foot-valve, which was liable to get out of order at any time, and which was well known to defendant, and which did get out of order, and when out of order a vacuum attached to the engine or attachment of said engine would be broken, and when so broken would cause hot water and steam to be forced in a pipe running up the side of the building whereby the plaintiff was scalded and burned. The amendment was rejected on the ground that it constituted a new cause of action. It was held that the original petition set forth no cause of action and there was nothing to amend by. The negligence alleged resulted from the acts of the employees of the defendant, who were the fellow servants of the plaintiff, and such negligence did not give him a cause of action. The amendment offered alleged that the plaintiff was injured by the negligence of the defendant in not providing proper machinery—a new cause of action in no way connected with the allegations contained in the original petition. Cobb, J., said: "If the petition had alleged that the plaintiff was burned and scalded by the negligent conduct of the defendant in the operation of its factory and had set forth some specific act of negligence, then, under the ruling in the *Harris* case, *supra*, an amendment containing additional acts of negligence might have been properly allowed. But the original petition contained no allegation of negligence which was chargeable, in law, against the defendant, and for this reason the case differs materially from *Harris's* case. This applies also to the *Kitchens* case, *supra*. And there is nothing in it to conflict with the ruling made in *Ellison's* case. If the opinion in that case is construed as a whole in the

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light of the record in that particular case, it will be seen that the amendments which are allowable under the authority of that decision are those which simply make perfect a cause of action which is improperly set forth in the pleading sought to be amended." Cited, 109/606; 114/680.

In *Roughton*, 109/604, Fish, J., said: "The negligence complained of in the original petition as the cause of the plaintiff's injury was that the defendant had left cars standing on its spur-track in such a position that the plaintiff could not get from Badger street, along which he was passing, to the sidewalk of Born street, without going into the middle of the latter street and passing around the cars, and that the ground on which he was thus forced to walk was rough, uneven, covered with snow and ice, and slippery; in consequence of which, in walking around the cars, he slipped and fell, thereby sustaining the injury for which he sued. The only negligence alleged against the defendant was the leaving of its cars across the street. It was not alleged that the defendant was in any way connected with, or responsible for, the condition of the street at the point where the plaintiff slipped and fell. The amendment however alleged that the defendant 'dumped and left unscattered a pile of dirt and old brickbats, which had become frozen and hard where plaintiff was compelled to walk around said cars, which made the ground rough and uneven,' and that the defendant left no signal or warning of any kind to put persons on notice of the rough place. This amendment introduced an entirely new item of negligence on the part of the defendant as the cause of plaintiff's injury, viz.: in the placing of an obstruction in the street, and leaving it unguarded; thus adding a new and distinct cause of action, which § 5683 (5099) of the Code forbids." Overruled, 120/785.

Where an action for a tort was brought against the Nashville, Chattanooga & St. Louis Railway Company, and the proof showed that the injury complained of was by the Western & Atlantic Railroad Company, the court, on motion, should have granted a non-suit. Where one railroad corporation is sued for a tort, the declaration can not be amended by substituting another as defendant, under the guise of correcting a misnomer. Where the action was against the Nashville, Chattanooga & St. Louis Railway Company, and the declaration alleged that "the defendant operates as lessee the Western and Atlantic Railroad," an amendment stating that "the lessee of the Western and Atlantic Railroad sued in this case,

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and operating said road at the time of the injuries to the plaintiff, was known and styled as the Western and Atlantic Railroad Company by virtue of a public act of this State" did not make the latter company a party to the action. *Edwards*, 91/24. Cited, 110/301.

In *Moyer v. Ramsey-Brisbane Stone Co.*, 119/734, it was held that the amendment which the plaintiff proposed to make to his petition was properly disallowed by the trial court, inasmuch as he thereby sought to introduce a new and distinct cause of action. *Turner, J.*, said: "The theory upon which the plaintiff brought his suit was, as shown by the allegations of his original petition, that the taking apart of a derrick of the kind described was a hazardous undertaking, at least for one inexperienced in doing that kind of work; and as he was a green hand, the company was under a duty to warn him of the hazards incident thereto, and was guilty of negligence in failing to perform this duty at the time he was ordered to take the derrick apart. In other words, his sole complaint was that the company's foreman did not tell him, an ignorant and inexperienced hand, that the particular work he was specially ordered to do was inherently dangerous for some reason unknown to him, but which was, or ought to have been, known by the company's foreman. The proposed amendment was not, therefore, germane to the case as originally stated. On the contrary, it is apparent that the plaintiff undertook, by means of this amendment, to introduce a new and distinct cause of action, based upon the theory that the defendant company was guilty of negligence in providing a derrick which was defectively constructed and therefore liable to violently spring apart and injure any one undertaking, in the usual and proper way, to take it apart by removing the cap, as was done by the plaintiff. That the company was negligent, in that it did not furnish to its employees suitable and safe machinery and appliances with which to perform their duties, was not even remotely hinted at in the original petition, but was for the first time suggested by the proposed amendment which the trial judge refused to allow."

An action against a railroad company as lessor or licensor of another company, for permitting such company to inflict injuries upon the plaintiff, can not be converted by amendment into an action against the same defendant as a common carrier of passengers, for inflicting the alleged injuries through its own servants and agents. *Heins*, 114/678. This case distinguished and doubted. *Haas*, 127/197.

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Where an action is brought solely upon a common-law liability, it is error to allow an amendment thereto which seeks a recovery upon a statutory liability. Such an amendment would add a new and distinct cause of action. (*Exposition Cotton Mills*, 83/441; *Bolton*, 83/659; *Parmelee*, 78/239.) *Miller*, 113/15.

An amendment to a petition adding a new cause of action should not be allowed, and if improvidently allowed may be stricken on motion; but if such an amendment has been regularly allowed and filed, and the petition as amended sets forth a cause of action, the same should not be dismissed on motion on the ground that the amendment adds a new cause of action. *Dyson*, 113/327.

In *Cone v. City Council of Augusta*, 120/80, *Lamar, J.*, said: "The negligence charged in the petition was the maintenance of a defective street. During the trial it developed that this defect had been suddenly caused by the bursting of a large water-main, which almost instantly washed a hole in the street. There were no allegations in the petition charging that the city was negligent in maintaining the water-pipe, and the judge therefore properly ruled that the counsel for the plaintiff could not argue that the city was liable because of its negligence in respect of the water-main. To meet this ruling, made during the concluding argument, plaintiff offered an amendment charging that the city knew or ought to have known of the defect in the pipe. This the court disallowed. If this amendment had been offered as the basis for the introduction of testimony; or if there had been a request to allow the case to be reopened for introducing evidence in support of the new allegations, the question would have arisen as to whether the amendment was germane. But, in the then state of the record, whether or not it introduced a new cause of action was immaterial, and the ruling was harmless. There was no evidence to sustain the charge in the amendment that the city knew or by the exercise of ordinary care could have known of the defect. There was therefore nothing in the record to sustain the new averment. Had it been allowed it could not have helped the plaintiff. Its disallowance did not harm him." It was held, that it is not error to prevent plaintiff's counsel from arguing that the defendant is liable because of an act of negligence not set out in the petition. If the amendment was germane, the refusal to allow the same was harmless, it not having been offered as a basis to authorize the admission of testimony, or to make available that already introduced, but

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offered during the concluding argument, and when in fact there was no evidence to sustain the allegations in the proposed amendment.

Where to an action of damages on account of personal injuries an amendment was allowed which alleged acts of negligence of an entirely different nature from those set up in the original petition, but in charging the jury the court gave instructions which expressly eliminated from consideration any acts of negligence charged in the amendment, and, in the light of the charge as a whole, the effect of the evidence introduced under the amendment must have been **more advantageous than injurious** to the defendant, the allowance of the amendment over the objection that it set up a new cause of action, whether originally erroneous or not, will not work a reversal of the judgment of the court below. *Monk*, 118/449.

552. Misnomer may be corrected.

Misnomers in civil suits may on motion be corrected by amendment. Code, § 5686 (5102). Therefore, where the petition in a suit for a tort alleged the Central Railroad and Banking Company of Georgia to be a corporation existing under the laws of this State, and that it had, by negligently running its cars, damaged the petitioner in a named sum, and prayed process against it, which was issued accordingly, but was served upon the agent of the Central of Georgia Railway Company, and where counsel for the latter company admitted in open court that at the time the suit was filed and process served there was no such corporation in existence as the Central Railroad and Banking Company of Georgia, but that the Central of Georgia Railway Company had, by means of judicial sale thereof, acquired the railroads, rights, franchises, etc., of the Central Railroad and Banking Company of Georgia, there was no error in allowing an amendment correcting the mistake in the name of the defendant corporation by substituting "the Central of Georgia Railway Company" for "the Central Railroad and Banking Company of Georgia" wherever the latter appeared in the petition and process. The ruling made in *Edwards*, *supra*, that "where one railroad corporation is sued for a tort, the declaration can not be amended by substituting another as defendant, under the guise of correcting a misnomer," does not conflict with the principle herein announced. *Maddox*, 110/301.

An amendment to a petition filed against the "Atlantic Coast

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Line, owning and operating a railroad under the laws of Georgia," by adding the words "Railroad Company" after the word "Line" and before the word "owning," so as to make the name of the defendant the "Atlantic Coast Line Railroad Company," and thus giving its proper corporate name, was not adding a new party, but simply correcting a misnomer. *Atlantic Coast Line Railroad Co. v. Cook*, 6 G. A. 128.

553. New party not added here.

Amendment of a declaration against the Chattanooga, Rome and Carrollton Railroad Company by substituting Columbus for Carrollton so as to give the defendant its proper corporate name, was not adding a new party, but simply correcting a misnomer. *Jackson*, 86/676. Cited, 110/301.

554. Lex fori controls as to procedure.

The practice of the *lex fori* in respect to pleadings, amendments and the general mode of procedure will control, if it differs from the practice of the State where the cause of action arose. *Nix*, 68/572. Cited, 1 G. A. 168.

OF JUSTIFICATION.

555. Justification in torts.

In every case of tort, if the defendant was authorized by law to do the act complained of, he may plead the same as a justification; by such plea he admits the act to be done, and shall be entitled to all the privileges of one holding the affirmative of the issue; but such plea shall not give to the defendant the right to open and conclude the argument before the jury unless it is filed before the plaintiff submits any evidence to the jury trying the case. Code, § 4488 (3891).

556. When a plea amounts to a justification.

The test to determine whether a plea amounts to a justification, so as to give the defendant the right to open and conclude, is whether such plea sets up facts which could not have gone in evidence under the general issue. To an action by the father of a factory operative for an injury to his minor daughter, resulting from the negligence of the defendant's agents, a plea admitting that, on a day

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named, the daughter was employed by the company in its spinning-room, and while so employed was injured, but denying that she was in the discharge and performance of her lawful duty, or that the company employed or continued to employ incompetent agents or officers, or that their acts were negligent, and asserting that, at the time of the injury, the girl was acting in violation of her instructions and outside of the scope of her employment, and that the injury resulted from her own negligence, was not a plea of justification. *Augusta Factory v. Barnes*, 72/217. Cited, 74/548, 837; 76/340.

Inasmuch as the answers filed deny the commission of an assault and battery of the kind and character alleged in the petition, and for which the plaintiff sought to recover damages, they can not properly be treated as pleas of justification, although they admit a battery of a minor character, and aver, as a justification of the battery as admitted, certain opprobrious words and abusive language spoken by the plaintiff to one of the defendants. But, treating the answers as pleas in extenuation and mitigation of damages, the trial judge committed no error in overruling a demurrer to the same. The provision of our statute that opprobrious words or abusive language may justify an assault, or an assault and battery, is applicable only on the trial of one who has been indicted for either of these offenses; and while on the trial of a civil action brought by one person against another, to recover damages for an assault and battery alleged to have been committed on the plaintiff by the defendants, any such words and language may properly go to the jury, they are admissible only in extenuation or mitigation of damages, and not as a justification. Fish, J., dissenting, as to this head note said: "The Code, § 4488 (3891) provides: 'In every case of tort, if the defendant was authorized by law to do the act complained of, he may plead the same in justification.' And § 4422 (3826) declares: 'A physical injury done to another gives a right of action, whatever may be the intention of the actor, unless he is justified under some rule of law.' Therefore, if, in a civil action for alleged assault and battery, 'the defendant was authorized by law to do the act complained of, he may plead the same in justification;' and 'a physical injury done to another' gives no right of action to the injured party, if the person inflicting the injury was 'justified under some rule of law.' The Penal Code, § 103 provides: 'On the trial of an indictment for an assault, or an as-

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sault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words or language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury.' It seems to me clear that when, in a prosecution for assault and battery, opprobrious words or abusive language do amount to a justification of the beating, the person doing the beating 'was authorized by law to do the act complained of,' and that it therefore follows that in a suit for tort, based upon the same beating, he 'may plead the same in justification.'" *Berkner v. Dannenberg, et al.*, 116/954. Reviewed and modified, 135/741. This case again, 118/885.

In an action for damages on account of an assault and battery, the defendant may give in evidence any opprobrious words or abusive language used by the plaintiff to him, in order to justify his conduct or mitigate the damages; and it is for the jury to determine, in view of the character of the provocation and the nature and extent of the battery, whether such opprobrious words or abusive language amount to a justification or only to a mitigation of damages recoverable. The reasoning of Mr. Justice Fish, now Chief Justice, as expressed in the dissenting opinion in *Berkner v. Dannenberg*, 116/954, 963 (43 S. E. 463, 60 L. R. A. 559), is approved and controls the present case. The decision made in that case, upon the point dealt with in the foregoing headnote, was not by the entire bench, but by three Justices only; and while the judgment announced by the majority of the court was controlling and could not be reviewed in the same case, and was followed in *Dannenberg v. Berkner*, 118/885 (45 S. E. 682), the principle did not thereby become the adjudication of the entire bench. In connection with the dissenting opinion, in the case of *Dannenberg v. Berkner*, *supra*, see Penal Code, § 103; *Cross v. Carter*, 100/632 (28 S. E. 390). *Thompson v. Shelverton*, 131/714. Cited, 135/757.

In order to entitle the defendant to the opening and conclusion before the jury under a plea of justification filed in an action to recover damages for the commission of a tort, the plea must admit the commission of the acts charged in the petition as they are therein alleged; and a plea which only partially admits the commission of the acts charged is not a plea of justification, and does not entitle the defendant to the opening and conclusion of the argument. Cited, 6 G. A. 859.

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Where a declaration alleged that an infant had been seriously injured through the negligence of the defendant's servants in not locking or securing a turntable, a plea which admitted that the child was injured by a turntable belonging to and used by defendant at the time and place alleged in the declaration, but denied that the defendant was at fault or negligent, was not a plea of justification. To constitute a plea of justification, the facts alleged must be such as are not admissible under the plea of the general issue. Blandford, J., said: "The plea denies any negligence on the part of the defendant. It does not relieve the plaintiff of any burden whatever except as to the injury." Chapman, 74/547. Cited, 74/748; 110/171. And a plea that admits only a part of the facts alleged in the declaration, and leaves the burden of proving the rest upon the plaintiff under the plea of the general issue, is not a plea of justification. Seymour v. Bailey, 76/338. Cited, 81/671.

A plea which admitted that the plaintiff was injured by the train of the defendant, but denied that it was guilty of negligence, and asserted that it used all ordinary care and reasonable diligence, and that the negligence of plaintiff caused the injury, was not a plea of justification which entitled the defendant to open and conclude the argument. Williams, 74/723. Cited, 110/171.

In a suit by the widow of a deceased employee of a railroad for his homicide by the negligence of his coemployees, a plea which admitted the killing, but did not admit either that decedent was free from fault or that the other employees were at fault, was not a plea of justification. When all the evidence, admissible under a plea claimed to be a plea of justification, would be admissible under a plea of the general issue, such a plea would not amount to a plea of justification, or give the defendant the right to open and conclude. Crosby, 74/737. Cited, 110/171.

The action being for damages resulting from an alleged assault and battery, a plea admitting the beating, and averring that it was lawful, because necessarily inflicted by the defendant's servant for the purpose of protecting his master's property from an unlawful trespass on the part of the plaintiff, was a plea of justification, and consequently defendant's counsel were entitled to open and conclude the argument. Strickland, 99/124.

557. When the doctrine does not apply.

In Morgan, 110/168, the plaintiff brought suit to recover for the

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killing of a cow. The defendant, in its answer, admitted that it was a corporation, and denied all the other allegations in the petition. After the conclusion of the evidence upon both sides, the defendant amended its plea and admitted that plaintiff was the owner of the cow, that the cow was of the value claimed and was killed by defendant's train at the time stated. Thereupon defendant's counsel claimed the right to conclude the argument, which was denied. And it was held that the ruling was right. Lewis, J., said: "The amendment offered is not strictly a plea of justification. Pleas of justification usually refer to such torts as malicious prosecution, assault and battery, libel, slander, and the like, and in them the defendant admits committing the acts complained of, and claims justification for his conduct. In this sort of a tort, however, of injuring property by the running of a railroad-train, we do not well see how there can be any plea of justification, for all the evidence under the plea as amended could have been admitted under a plea of the general issue. A plea of justification is an admission by a defendant that he purposely committed the acts complained of, and upon which the action was founded, and sets up facts or reasons for justifying such acts. The railway company in this case could, of course, not set up such justification; for under no circumstances could it willfully and purposely kill stock upon its track. The right to open and conclude, therefore, in a case of this sort is founded upon the principle that the defendant has assumed the affirmative of the issue; and it is really upon the same principle on which the statute with reference to pleas of justification is founded; for that statute declares that one filing a plea of justification is entitled to all the privileges of one holding the affirmative of the issue. We think, therefore, the manifest policy indicated in the Act of 1888, amending the original statute on this subject, is to deny to the defendant in any case the right to open and conclude, unless he relieves the plaintiff of the burden of making out a prima facie case, and the admission must be made, and the right to open and conclude asserted, before the plaintiff submits any evidence in the case."

558. Where a trial is had on the pleadings alone.

In *Parker v. Lanier*, 82/216, the plaintiff sued the defendant for shooting and wounding him. The defendant pleaded the general issue, and with it a plea of justification. Neither party introduced any evidence, only the pleadings being before the jury. It was

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held that, in an action for tort, where the defendant by his plea admits and justifies, and no further evidence is adduced by either party, damages may be assessed by the jury upon the admissions contained in the plea. Such admissions are to be taken as unqualified by the connected matters alleged in justification. Punitive as well as compensatory damages may be awarded. Bleckley, C. J., said: "Under § 4488 (3891) of the Code, a plea of justification supersedes the general issue, devolves the burden of proof upon the defendant, and, if not sustained, entitles the plaintiff to recover general damages. It follows that such damages may be assessed by the jury upon the admissions of the plea alone, where no other evidence is before them. The law furnishes no measure of damages for pain and suffering but the enlightened conscience of impartial jurors. Of course, their estimate of the amount must be made upon the facts before them; but a plea which expressly admits the facts alleged in the declaration proves them as effectually as if they were vouched by witnesses. To limit the admissions of the plea by the matters set forth as justification would be to cancel their effect altogether. The very thing the defendant undertakes to do by filing a plea of justification is to qualify his confession by proof as well as by pleading. He confesses certain facts, and offers to neutralize them by proving other facts. Until he does prove them, the jury can not recognize their existence for any purpose. Certainly, if the facts admitted by the plea were verified by a witness, and nothing appeared in mitigation, the jury would be warranted in treating so dangerous an assault as a tort, attended with circumstances of aggravation, both in act and intention. If then, the truth of the facts was established by the plea itself, and there was no need for calling a witness, why might not punitive damages be awarded upon the plea the same as upon sworn testimony? We think the jury were authorized to entertain and decide the question of punitive or exemplary damages on the facts and circumstances of the tort as they stood confessed in the plea." Cited, 83/242; 96/153; 126/61.

559. The general issue.

Where, to an action for assault and battery, the only plea filed was that of the general issue, the jury could not consider the question of justification. *Ratteree v. Chapman*, 79/574; *Kerwich v. Steelman*, 44/197.

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On the plea of the general issue a railroad sued for killing stock may show by evidence that the stock was killed on the road of 'another company, and by the servants of such other company, and not by its own servants. Buice, 88/180.

In an action for damages for an assault and battery, the character of the plaintiff for turbulence of itself affords no justification. In such an action, where the defendants' plea was self-defense, and that they had acted under the fears of reasonable men, and where it appeared that the battery was caused by opprobrious words spoken by the plaintiff, but there was no actual assault on defendants by him, it was not error to charge that the jury might consider the character of the plaintiff for turbulence, so far as known to the defendants, in passing on the question whether they acted under the fears of reasonable men. The petition alleged that immediately after the battery one of the defendants stated in a loud voice to the passengers in the car, as his excuse therefor, that it was because the plaintiff "denied owing a debt which he has owed for the past nine years." There was no special demurrer. Even if not actionable in a suit for slander, it was not error to charge that the words could be considered by the jury in assessing the damages. *Dannenberg v. Berkner*, 118/885.

560. Matter pleaded in mitigation.

In *Conley v. Arnold*, 93/823, it was held that matter pleaded in mitigation of damages is not objectionable as mitigation because it would not serve to justify. In an action for a personal injury, where a plea of justification is filed, and the jury find for the plaintiff damages to the amount of one dollar only, the verdict is contrary to law, for in such case failure of the defendant to prove justification entitles the plaintiff to a verdict which would carry all the costs of the action, and, under § 5984 (5391) of the Code, a verdict for one dollar and costs would not have this effect.

ALLEGATA AND PROBATA.

561. Parties should be confined to the case made in their pleadings.

Niceties of pleading are not required in justices' courts. Consequently, a variance between the statement in a justice's court summons that a sandy yellow heifer two and a half years old was

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killed, and proof that a sandy yellow heifer one and a half years old was killed, is not material. The difference in age does not affect the identity of the property injured, in view of the proof of other descriptive averments. *Smith*, 3 G. A. 645; 6 G. A. 308.

In a suit in a justice's court for the killing of live stock through the negligence of the employees of a railroad company in the operation of its trains, it is not necessary that the plaintiff should set out the particular acts of negligence. The strictness of pleading required in superior and city courts does not pertain to justices' courts. *Barfield*, 1 G. A. 203 (58 S. E. 236); *Oliver*, 1 G. A. 734 (58 S. E. 244); *Southern Express Co. v. Briggs*, 1 G. A. 294 (57 S. E. 1066); *Hendrix v. Elliott*, 2 G. A. 301 (58 S. E. 495); *Patterson v. Sams*, 2 G. A. 755 (59 S. E. 18); *Jackson v. Brothers & Sisters of Promise*, 2 G. A. 761 (59 S. E. 11); *Smith*, 3 G. A. 644 (60 S. E. 353); *Crapps*, 4 G. A. 550 (61 S. E. 1126); *Oliver*, 6 G. A. 308.

It is not required that the correspondence between the pleading and the proof shall be literal or to absolute verbal nicety; it is sufficient if there is a reasonable and substantial correspondence. By *Powell, J.*, 7 G. A. 181.

"We recognize as established by the precedents in this State the proposition that a party has the right to insist, especially by timely written request, that the judge shall eliminate from the consideration of the jury uncontested propositions, and that he should not submit, as issuable, propositions which are admitted or are not issuable under the evidence." By *Powell, J.*, *Schaufele*, 6 G. A. 660.

Trial courts are required to submit to juries only issues made by the pleadings and evidence. *Elarbee*, 6 G. A. 137.

It is error for the court to omit to charge the principles of law applicable to proper contentions of either party to a cause, where such contentions are authorized by the pleadings and are sustained by testimony, and thus become issues in the case. *Baker*, 1 G. A. 832.

In *Perry*, 8 G. A. 427, *Russel, J.*, said: "The motion for new trial avers that the court erred in charging the jury as follows: 'The defendant further contends that the engine made no loud or unusual or unnecessary noise, or in fact any noise at all, and that the accident was caused by the horse, as it alleges it backed the buggy into the engine, and that the engine was standing still at the time, and that the accident was entirely due to the negligence of the

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plaintiff in the case; and for that reason the defendant contends that it is not liable to the plaintiff for the amount that was alleged, or any other amount as damages.' It is insisted that the defendant made no such contention, and that this is true because the defendant's answer is a mere denial of the several paragraphs of plaintiff's petition. It is true that the contention of the parties are generally to be shown from their pleadings, and that the answer of the defendant in this case does not specifically set up the defense to which the court referred. But we fail to see wherein the instruction quoted above could have been hurtful to the defendant. It is conceded by counsel for the plaintiff in error that the charge of the court would have afforded the jury a reason for disregarding the plaintiff's injury, on the idea that the railway company was not liable therefor, and in fact the instruction was more favorable than the defendant was entitled to. As understood by the jury, contentions can be presented outside of the pleadings, by the course of the examination of the witnesses, and by oral arguments." It was held that the assignment of error was without merit.

It is the duty of the court to inform the jury as to the issues submitted by the pleadings; and this may be done by stating the contentions of both parties as they appear in the pleadings which the jury will have with them in the jury room. And if any issue has by any means been eliminated, it is the duty of the judge so to inform the jury. Their attention may be called to the abandonment of an issue by first stating the original contentions, and then informing them as to what has been abandoned. And where counsel, in open court, calls the attention of the court to the fact that his client has abandoned one of the contentions raised by the pleadings, and the court acquiesces, the fact that the court has previously stated that the abandoned contention appears in the original pleadings can not prejudice the cause of the defendant, but rather tends to accentuate the plaintiff's abandonment of his position. Wright, 6 G. A. 172.

Instructions presenting issues not made by the pleadings or evidence should not be given. O'Bryan, 115/659.

It is erroneous for a trial judge to charge the jury upon issues not made by the pleadings or evidence in the case on trial; and where this is done, when the evidence is conflicting on the issues really involved, in a way which may mislead the jury, it is cause for a new trial. Where the questions raised were whether the con-

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ductor or other authorities on a railroad-train had improperly arrested, misused, and maltreated the plaintiff, and no question as to the propriety or impropriety of ejecting him from the train was, under the evidence, involved, a charge which injected this issue into the case was erroneous. *Gresham*, 114/183.

The trial court properly refused a request to give a charge which was not applicable to the evidence in the case. *Standard Cotton Mills v. Cheatham*, 125/649.

The court may present a defense of the defendant most strongly by excluding from the consideration of the jury all liability under the plaintiff's claim of right of recovery as to that matter. *Merchants & Miners Transportation Co. v. Corcoran*, 4 G. A. 654.

In *McKinney*, 118/535, it was held that where the judge states fully and accurately the law applicable to the issues involved, the mere failure to call the attention of the jury in specific terms to the contentions of the parties as shown by the pleadings, and to explain these contentions to them, will not, unless it is plain that the omission resulted in injury to the losing party, require the granting of a new trial. *Cobb, J.*, said: "Complaint is made that the court erred in charging the jury as follows: 'The specific acts of negligence alleged by plaintiff are set out in his declaration and in an amendment filed to it. You will have that declaration out with you in your jury-room, with the amendment, and by a careful reading of it you will see the various acts of negligence which are alleged by the plaintiff in this case.' The assignment of error upon this charge is that it was the duty of the court to state the contentions of the parties and explain them to the jury, and that it was error to instruct them simply that they might ascertain these contentions from an inspection of the pleadings. In *Findley*, 76/311 (3), it was held: 'It is the right and duty of the presiding judge to state to the jury the several contentions between the parties, the only restriction being that he shall state them fairly to each side.' In that case complaint was made because the court stated to the jury the contentions of the parties, and the ruling made was, in effect, simply that it was proper for the judge to do this, being careful to state the contentions of both parties fairly. It certainly can not be held that in every case the mere failure of the judge to state the contentions of the parties in his own language is such an error as requires the granting of a new trial. If a case should arise where the omission plainly operated to the prejudice of the losing

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party, a new trial might be required, but the present record presents no such case. The case of *Sackett v. Stone*, 115/466, was a case of this character. The really important thing is for the judge to give the jury clearly and fairly the law applicable to the issues involved; and if he does this, his failure to formally state the contentions as shown by the pleadings will not, as a general rule, be cause for a new trial." Cited, 120/226; 129/207; 129/685; 130/659; 132/561.

If the court correctly instructs the jury as to the law applicable to the issues involved in the case, mere failure to "affirmatively" state the contentions of the parties as shown by the pleadings is not cause for a new trial. *Gornto*, 129/204.

Where, in a suit against a railway company on account of a personal injury, the charge of the court nowhere informed the jury what were the issues or contentions between the parties, made by the pleadings or evidence, and the charge given consisted almost entirely of abstract principles of law, and they were not so accurately applied to the case as to render it probable that the jury apprehended what were the issues, or that the omission to instruct them on that subject was harmless, a new trial will be granted. *Atkinson, J.*, said: "The charge of the court nowhere stated to the jury what were the issues or contentions between the parties. It did not even refer them to the pleadings to ascertain the allegations of the parties, as has sometimes been done. *McKinney*, 118/535 (45 S. E. 430); *Bagwell*, 107/157 (33 S. E. 191). It made no reference to the pleadings, except that it commenced in these words: 'When a railroad company, in the operation of its cars, injures the person of any one, that person is entitled to recover damages, unless the railroad company can show that, in the operation of its cars, its employees were in the exercise of ordinary and reasonable care and diligence, the presumption being against the railroad company—in the event the plaintiff proves his declaration as laid.' This could hardly be taken as even referring the jury to the pleadings to ascertain the issues between the parties. The charge consists almost entirely of statements of abstract principles of law, and we can not say that it was sufficiently explicit, in concretely applying the law to the case, to supply the omission of any statement to them as to what were the real contentions between the parties as presented by the pleadings and evidence. Where the judge informs the jury what the substantial contentions are and

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gives the law applicable to the case, although it may be somewhat generally stated, if parties desire more specific instructions given to the jury, they should make proper requests therefor. An omission to state in express terms the contentions of the parties may sometimes be cured by such a concrete application of the law to the facts of the case as that the jury would clearly understand the respective positions and the law applicable thereto. But a mere general statement of abstract rules of law will not suffice, in the absence of any statement whatever of the issues arising from the pleadings and evidence." Jackson, 132/559.

It is not error for the trial judge, in charging the jury, to summarize the pleadings and instruct them that "that makes the issue that you are sworn and empanelled to pass upon," without further charging them upon a theory of defense not set up in the defendant's plea, and upon which a charge is not requested by counsel and is not demanded by the evidence. *Eagle and Phenix Mills v. Herron*, 119/389.

In *Bishop*, 132/37, it was held that where it is complained that a certain charge is "not appropriate nor adjusted to the evidence in the case," and it appears from the record that there was evidence raising the question dealt with in the charge, the exception is without merit. There is a difference between issue and evidence, and the requirement that the judge shall instruct the jury as to all the issues raised does not impose on him the duty of singling out particular portions of the evidence and charging thereon. In the absence of a special request the judge is not bound to instruct the jury as to the effect of an admission by either party to the record. *Lattimore*, 118/581.

In stating the contentions upon which a plaintiff relies for a recovery, it is proper for the trial judge to confine his statement thereof to those matters which it is necessary that the plaintiff should establish by proof; and if the defendant desires any instructions given the jury touching admissions made in the plaintiff's pleadings, an appropriate request to charge in regard thereto should be presented. *Lasseter*, 122/679. Cited, 4 G. A. 283.

When in an action for personal injuries the original petition alleges certain acts of negligence, and by amendment additional acts of negligence are alleged, and the plaintiff in open court abandons all right to recover on the acts of negligence alleged in the original petition, it is not error to submit the case to the jury entirely upon

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the issues made by the amendment, making no reference to the issues of negligence raised by the original petition. *Dukes*, 121/787.

When the defendant filed no plea other than to deny seriatim the paragraphs of the plaintiff's petition, and the court fully instructed the jury that such denials had been made, an assignment of error is not well taken which complains (especially in the absence of any written request) that the court did not present the defendant's contentions in a manner fuller than the defendant pleaded them; more especially is this true where the court, throughout the charge, stated several times the principles of law applicable to these contentions. *Hill v. Ludden*, 113/320 (3); *Pittsburgh Spring Co. v. Smith*, 115/764 (2). *Stanley*, 1 G. A. 487.

Where in one portion of the charge to the jury the court correctly states one of the contentions of the losing party, the mere failure to state in immediate connection therewith, fully and plainly, other contentions of such party, does not constitute error. To show error it should be made to appear that nowhere in the court's instructions were the contentions of the party complaining stated with sufficient fullness and clearness. *Standard Cotton Mills v. Cheatham*, 125/649.

It was error for the court to charge the jury that the defendant, as a part of its defense, contended certain things which in fact were outside of its contention and not relied on by it; and such incorrect statement was not cured by the fact that near the close of a charge of considerable length the presiding judge again stated to the jury that the defendant contended certain things, less in extent than the former statement, but which he did not withdraw or modify, so that the jury might be left to understand that both statements were correct. There being no contention in this case that the master failed in his duty as to using ordinary care in selecting fellow-servants, or that it knowingly retained incompetent servants, it was error to charge as to those matters. *Fort Valley Knitting Mills v. Anderson*, 124/909.

Where there was no issue in the case involving the duty of the master to exercise ordinary care in the selection of servants and not to retain them after knowledge of incompetency, the court should not have charged on that subject. The charge should not include issues not in the case. *Southern Cotton Oil Co. v. Skipper*, 125/368.

The reference made by the court in his charge to one of the con-

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tentions of the defendant as the "real contention," while an inapt expression, was not, in the light of the whole charge and the facts of the case, of such harmful effect to the defendant as to require a new trial. *Cotter*, 132/461.

In *Joyner*, 129/683, it was held that the charge of the court stated the contentions of the parties fairly and with sufficient fullness and clearness. And certain inaccuracies appearing in the statement of the contentions of the defendant were not so material as to require the grant of a new trial. *Beck, J.*, said: "While it is undoubtedly true that the contentions of the plaintiff were stated more at length than those of the defendant, it can not be inferred from this fact that undue stress was laid upon or undue prominence given to the contentions of the former. In the first place, the contentions, so far as appear from the pleadings of the plaintiff, are set forth fully and distinctly in his petition, properly paragraphed, and the defendant contented itself, as it had a right to do, with a bare denial of the allegations in the petition. If the plaintiff's case requires a full, definite, and affirmative allegation of certain facts, and the defense to the cause of action as stated rests upon a mere denial of the allegations in the petition, and the trial judge sums up the contentions of both parties by a fair statement of the material allegations in the petition, and then states that these allegations are denied by the defendant, how can it be said that he has failed to state the contentions of either party? But in the case at bar the judge, after setting forth in his instructions to the jury the affirmative allegations in the petition, went further and gave in substance the contentions of the defendant as developed in the trial of the case; and it would seem that if the defendant had desired a more elaborate statement of its contentions, a timely written request therefor should have been offered. In the case of *Bagwell*, 107/157, it was said, 'In the sixth ground of the motion for a new trial, complaint is made that the court erred in its charge in stating specifically the contentions of the plaintiff, as set out in the declaration, and in regard to the contentions of the defendant merely charged that "You will also have the answer of the defendant company, and you can look to that for its contentions." While the contentions of both parties should be stated by the court to the jury with equal fullness and fairness, yet in this case we do not think the plaintiff in error has any just cause of complaint in this respect, as the court in its charge fully, fairly, and correctly stated the law applicable to

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every issue in the case. Moreover the answer of the defendant was simply a denial of the allegations in the declaration.'” Cited, 130/658.

After the court had in its charge twice stated fairly and explicitly all the specifications of negligence alleged against the defendant in the petition, it was not cause for a new trial that in the same connection, and while instructing the jury to look to the evidence in order to ascertain the truth as to each allegation and contention, the court omitted from its enumeration of such allegations one charge of negligence, it appearing that this portion of the charge closed with the statement that “all these matters and all these contentions wherein it is charged that the defendant company was negligent * * * are matters entirely for you to pass upon,” under the evidence submitted and the law given in charge. Sanders, 123/763.

Where there was no evidence to show wilfulness, recklessness, and wantonness on the part of the employees of the defendant, the judge should not have referred thereto in his charge. Jackson, 132/559. Cited, 132/817.

The petition alleged “That said injuries, so received as aforesaid, were inflicted upon your petitioner wholly by the negligence of the said Central of Georgia Railway Company, in the negligent running of its cars at said time and place, and in the negligent failure to keep its roadway and track at that place in a safe condition for the passage of trains thereon,” and the allegation in regard to the failure of the defendant to keep its roadway and track in safe condition was stricken upon demurrer. There was not in such petition, or in any amendment allowed by the court, any other allegation in regard to the negligence of the defendant with respect to the condition of such “roadway and track.” Held, that where upon the trial the plaintiff testified, “When I was going over the car I got throwed off; it struck a low place in the track. The car was running when I was throwed off. The low place caused the car to tilt to one side, caused it to go down,” it was error to charge, “Gentlemen, the rule of care with reference to the condition of the track of the railroad company is that of ordinary care.” Such error was not cured by the other portions of the charge of the court to the jury. Bell, 133/92.

When the declaration alleges a particular act of negligence on the part of the company as the cause of the homicide, proof of other

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acts of negligence will not authorize a recovery unless the jury be satisfied, from the evidence, that the negligence charged has been proven. Our law requires a plaintiff plainly and distinctly to set forth his cause of action. And if one bring a suit based on one set of facts, it is obviously unfair to permit him to recover on another dropped out incidentally, and perhaps by way of defense. *Oaks*, 52/410. Cited, 97/769; 86/630.

If the plaintiff fell into the hole described in her declaration, and that hole was caused by the defendant's negligence, and if she could not have avoided it by the exercise of ordinary diligence, she might recover; but if the hole into which she fell was a different one from that described in the declaration, or if it was not caused by the defendant's negligence, or if she could have avoided it by the use of ordinary diligence, she could not recover. *Brunswick Light Co. v. Gale*, 91/813.

In *Hill v. Callahan*, 82/109, the plaintiff brought suit to recover for the homicide of her husband, an employee of the defendants, who were engaged in building a railroad. The declaration alleged in substance that the defendants ordered her husband to go to a fire and thaw out some dynamite; that near the fire a box of dynamite caps had been placed by the defendants, in a negligent manner, so near the fire that there was danger of their being thrown into the fire or otherwise exploded; after her husband reached the fire, another employee rushed by and caused the caps to fall into the fire, they exploded, and without fault on his part, and on account of the negligence of placing the caps so near the fire, her husband was killed. The court charged the jury: "You will see whether the dynamite caps were placed there by order of defendants or their agents whom they had in charge of these explosives. If they were not placed there by defendants, or their agents whom they had in charge of these explosives, the defendants would not be responsible for the accident." The exception to this charge was that the court should have further charged that if the caps negligently left the possession of the contractors or their employees in any way, it would have been negligence on their part, whether the caps were placed there by their order or not; it being their duty to see that the caps were safely kept. *Simmons, J.*, said: "The rule of pleading is that the plaintiff should plainly, fully, and distinctly set forth his cause of action. It will be seen, by reference to the declaration in this case above set out, that the plaintiff fully complied with this rule. The acts of

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negligence which she alleged in her declaration, and on which she relied for recovery, were the placing by the defendants, either by themselves or their agents or employees, of those dynamite caps so near the fire as to be dangerous. This is repeated time and again in the declaration. These were the acts of negligence which she called upon the defendants to answer. Upon these alone she sought to recover. No amendment was made by her during the progress of the trial alleging any other acts of negligence. We therefore do not think that the court erred in confining her in his charge to the acts she alleged in her declaration. The pleadings in the case are contentions of the parties. They make the issues upon which evidence is to be admitted, and on which the court is to instruct the jury. By them the parties must stand or fall. If the court submits only these issues to the jury in his charge, it is not error, and the parties have no right to complain." Cited, 107/136; 108/194.

In Nash, 81/580, a new trial was not granted simply on account of a charge by the court which seemed to authorize a recovery upon proof of acts of negligence not charged in the declaration, it appearing that this impression was not intended to be conveyed by the court to the jury, and taking the entire charge together, the evident meaning of the court was that the plaintiff could not recover except upon proof of the specific allegations in the declaration. Cited, 86/631; 97/769; 119/845.

A plaintiff suing to recover damages for personal injuries must prevail, if at all, by proving the specific acts of negligence with which the defendant is charged. Evans, J., said: "It is insisted that the court committed error in failing to charge that when the employees of a railway company attempt to assist a passenger in alighting from its cars, it is incumbent upon them to render proper assistance, and a failure on their part to do so would be negligence. A plaintiff must recover, if at all, upon the allegations of negligence pleaded. In the petition filed in the present case, and subsequently amended, there was no suggestion that any employee of the company was negligent in rendering improper assistance to the plaintiff. Indeed she alleged that the conductor was negligent in failing to offer her any assistance at all or to catch her when she fell. Nor would the evidence have warranted an amendment setting up as a ground of negligence any act of the company's employees in attempting to assist the plaintiff in alighting." In a suit to recover damages for personal injuries alleged to have been sustained by reason

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of negligence on the part of the defendant, the plaintiff must recover, if at all, upon proof establishing the specific acts of negligence alleged in his petition. *Weekly*, 124/384. Cited, 129/370; 3 G. A. 274, 346.

The plaintiff based his right of action against the defendant upon the negligence of the latter's employees in suddenly and violently starting a car (which had been stopped upon a signal given by the plaintiff, who was attempting to board the car) without giving him reasonable opportunity to board it in safety; in consequence of which negligent act he was thrown to the ground and injured; and it was error for the court, after having properly charged upon this (which was the sole theory of the plaintiff, as appears from the petition), to so charge the jury as in effect to authorize them to find for him upon a state of facts entirely different from those upon which, by his pleadings and evidence, he rested his right to a recovery. *McClelland*, 128/87.

The presumption of negligence arising by operation of law Code, § 2780 (2321) is a rule of evidence, and has no application to a plaintiff's petition. A plaintiff must allege sufficient specific acts of negligence, as to the injured party, to withstand demurrer, and can recover only on the specific acts alleged. *Harden*, 3 G. A. 344.

In a suit for damages for personal injuries occasioned by the negligence of the defendant, the plaintiff can not recover except upon the acts of negligence set out in his declaration. It is therefore error to give the jury instructions to the effect that, if the defendant was not guilty of the acts of negligence alleged, still the plaintiff might recover if the defendant were in other respects negligent. *Georgia Brewing Association v. Henderson*, 117/480.

Where the plaintiff's declaration and the evidence in support of it tended to make a case of a willful tort on the part of a street-car conductor, committed on a passenger by forcibly pushing or kicking her off the car, and the evidence on behalf of the defendant tended to show that after the car had stopped a sufficient length of time and signals had been given, and, upon her failure to alight, it had moved on, she voluntarily stepped from the car and was injured, it was error to so charge the jury as in effect to authorize them to find in favor of the plaintiff if she was not in fact wilfully ejected from the car, but was injured by reason of negligence on the part of the conductor in not allowing sufficient opportunity for a passenger to leave the car. *McElvey*, 126/491. Cited, 128/89.

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In *Moran*, 116/441, *Simmons*, C. J., said: "On the argument of the case before this court, counsel for the defendant in error laid great stress upon the fact that the evidence disclosed that the car was furnished with a brake which was out of order, and upon the further fact that Jackson was not shown to have been aware of its defective condition. We can not, however, uphold the verdict on the ground that the company was negligent in the respect just indicated, for the reason that the plaintiff nowhere in her petition makes mention of the defective condition of the brake, or predicates her alleged right to recover on the theory which her counsel for the first time urge before us. That a plaintiff must recover, if at all, upon the case made by his pleadings, is an axiom which we are not at liberty to overlook or disregard."

The court below having charged the jury, "If the plaintiff recovers in this case, I charge you that she must recover upon proof of acts of negligence set out and alleged in the declaration," it was not necessary for the court to add this qualification to every proposition of law which he charged, when instructing the jury as to what state of facts would authorize them to find for or against the defendant. *Allen*, 130/656.

Where the presiding judge, at one part of the charge on the subject of the presumption arising from proof of injury from the running of the cars of a railroad company, or the acts of persons in its employment, did not limit such presumption to the specific acts of negligence alleged, but in his general charge did clearly and specifically confine the jury to the consideration of such specifications of negligence, this furnishes no ground for a new trial. *Reeves*, 123/697. Cited, 129/370.

It was held in *Snowball*, 130/83, that the excluded evidence was irrelevant, and did not illustrate any issue made by the pleadings. *Evans*, P. J., said: "The court properly rejected evidence offered to prove a state of facts from which an inference could be drawn that the railroad company had impliedly licensed the general public in using a path on its right of way alongside its track. The petition alleged that the plaintiff's husband was killed on the public-road crossing. The probata should agree with what is alleged. The rejected evidence was irrelevant."

If the substantial law covering the issues made by the pleadings and evidence is given, and more specific instructions are desired by either party, they should prefer timely requests for that purpose. *Jackson*, 132/559.

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A charge embracing an abstractly correct and pertinent legal principle is not rendered erroneous by a failure to charge some other legal principle applicable to the case. *McGhee v. Young*, 132/607.

It is not error to refuse a written request to charge, when such request, so far as it is legal and pertinent, has already been sufficiently covered in the court's general charge. *Jackson*, 132/559.

A charge which manifestly, from the evidence, does not mislead the jury, is not ground for a new trial, though it may have been inapplicable to the facts of the case. The error may be treated as harmless. *Reynolds*, 126/657.

Where both parties by their evidence make it clear and undisputed that the plaintiff was injured, it is not reversible error for the court, in the charge to the jury, to assume the existence of the injury as not being in issue. This is especially true where the defendant's counsel, in his written requests to charge, likewise assumes such fact. *Stanley*, 1 G. A. 487.

562. No substantial variance in these cases.

An alleged variance, in that the allegation was that the defendant placed in his show-window certain viands and other things tending to tempt a passer-by to look into the window, whereas the proof showed that the window did not contain such things as was alleged, oysters, boxes, etc., is not material to the merits. *Folsom v. Lewis*, 85/146.

The declaration alleging that the plaintiff's hand was crushed and injured by the falling of an eccentric upon it, proof that the eccentric in falling knocked his hand upward, and crushed it against other machinery, was not so far inconsistent with the declaration as to constitute a substantial variance between the allegata and probata, but it would have been better to amend the declaration so as to make it conform accurately to the evidence. *Miller*, 90/571.

The declaration alleging that the plaintiff became entangled in a coil of telephone-wire belonging to the defendant, which it had negligently left lying or hanging in the street, and that, the wire becoming entangled in her clothing, she was thrown violently on the pavement and injured, and the evidence showing that one end of the wire was fastened to a pole and the other to a tree, that it was about six or seven inches from the ground, that a parcel of it was tangled up, and that the plaintiff became entangled in it, and tripped and fell over it, there was no substantial variance between

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the allegata and the probata as to the manner in which the injury was occasioned. *Southern Bell Telephone Co. v. Lynch*, 95/529.

In *Tankersley*, 3 G. A. 548, it was held that there is no material variance between the allegations and the proof, as to how the injury occurred. Hill, C. J., said: "The petition alleges, that the plaintiff was on the crossing and in the act of crossing, when the train approached suddenly, frightening his mule, and the mule ran down the track (meaning down on the track itself); and that the wagon was overturned and he was thrown out of the same. The evidence of the plaintiff, pertinent to these allegations, is, 'that the mule was not right on the track, but was almost to the crossing, and he wheeled to the left and ran down the track, by the side of the track, and 'I jumped to the left and jerked the girls; we all went out together, and landed on the ground.' It is contended that there is here presented a fatal variance as to the place where the mule was when the train suddenly approached, in what direction the mule ran, and how the plaintiff got out of the wagon; and the court was requested to charge in effect that such variance was fatal and would prevent a recovery. We do not concur in this view. On the contrary, we think that the allegations and the proof on this point are substantially in accord. How can it be material whether the mule was on the track or near the track; whether, when frightened, he ran down on the track or alongside the track; or whether the plaintiff fell out of the wagon or jumped out of the wagon? The variance, to be fatal, must be on material questions. The law demands unity only in essentials, and is satisfied with substance." Cited, 4 G. A. 317.

In a suit against a railroad company for damages, where the petition alleges that the plaintiff was injured while in a freight-car, unloading freight into a wagon, and where the proof is that the plaintiff was injured while standing in the freight-car, with one foot out upon the wagon, engaged in an effort to remove a piece of machinery from the car into the wagon, there is no such variance between the proof and the allegations as would prevent a recovery. Upon other points wherein it was insisted that there was a variance between the proof and the pleadings, though conflicting, there was some evidence fully sustaining the allegations, thereby avoiding the question of variance. *Varner*, 129/844.

Although there may be a variance between the proof and the allegations of the original petition, it ceases to be a variance when

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fully met by an amendment. Hill, C. J., said: "We do not think that there is any material variance between the allegations and the proof. It is contended by the plaintiff in error that there is such a variance because it is alleged that the car moved 'forward,' and the proof of the plaintiff is that the car moved 'backward.' The gist of the negligence charged is the movement of the car when the plaintiff was in the act of stepping from the running-board; and whether it moved forward or backward is immaterial, if in fact it did move at that time, and if the consequence of the movement, whether forward or backward, was to throw the plaintiff to the ground. The law requires agreement of the proof with a material allegation; and where the allegation is substantially proved any variance as to immaterial particulars is not regarded. Tankersley, 3 G. A. 548 (60 S. E. 297); Miller, 90/571 (16 S. E. 939). The petition put the defendant on notice that the injury was caused by the movement of the car while the plaintiff was in the act of alighting; and whether it moved forward or backward did not in any essential respect vary on this point the case presented by the petition. Besides, the record fails to disclose that any objection was made by the defendant to the admission of this testimony, on the ground that it was different from the allegations of the petition; and it is too late to make such objection after the verdict. Barber, 71/644; Haiman v. Moses, 39/708; Hubbard, 86/627 (12 S. E. 1020); Miller, *supra*. But any objection to the verdict on this ground is entirely eliminated by the amendment to the petition. This amendment alleged, that while attempting to alight from the car, the plaintiff was thrown therefrom, by the car being moved without notice to her, and that her injuries were caused by the defendant in moving the car without notice to her while she was in the act of getting off. Under this allegation, testimony that the car moved either backward or forward would have been admissible." Lewis, 4 G. A. 373.

In Smith, 113/629, Lumpkin, J., said: "It is not essential that, in an action for a tort the plaintiff must prove the commission thereof on the precise day alleged in the petition. In McElmurray, 24/75, it was held: 'If in a proceeding against a railroad company it is alleged that the injury complained of was committed on a different day from that shown by the proof, the variance is not fatal.' There it was alleged that the injury was inflicted on the fourth day of the month, while the proof showed that it was done on the fifth. See Sims, 111/820."

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In *Murphy*, 4 G. A. 522, it was held that where the plaintiff proves his case as originally laid, but, in order to avoid the effect of testimony introduced by the defendant in contradiction of it, subsequently amends the petition, and thereby brings it into variance with all the proof, the court may, at least as against exception by the plaintiff, end the trial, by an order of dismissal, in the nature of a nonsuit. *Powell, J.*, said: "The amendment related back to the beginning of the case. The plaintiff's testimony was wholly variant from the case as thus laid. The defendant's testimony certainly did not make out a case for the plaintiff but showed clearly an injury brought about by her own fault. It was manifestly proper, therefore, that the court should give the case some such direction as would refuse the plaintiff a favorable judgment. Usually nonsuit is the proper termination of a trial when the plaintiff's recovery is precluded by variance between the case as laid and the case as proved; and the direction of a verdict in favor of the defendant is the proper termination only when the plaintiff has at least *prima facie* proved his case as laid, and the subsequent evidence has irrefragably disproved it. Cf. *Proctor v. Blakely Oil Co.*, 128/606 (57 S. E. 879). In the usual progress of a trial the time for the moving and for the granting of a nonsuit is when the plaintiff first rests his case; but when, as in the present instance, nonsuit has not been granted at that time, and the subsequent course of the trial retains or takes on such shape and condition that the evidence remains or becomes wholly and absolutely in conflict with the pleadings, the court may, without error, refuse the plaintiff the privilege of going to the jury, and may end the case by a judgment of dismissal, in the nature of a nonsuit. *Grand Rapids Co. v. Morel*, 110/321 (35 S. E. 312); *Kelly v. Strouse*, 116/894 (43 S. E. 280)." Cited, 7 G. A. 67.

563. Substantial variance in these cases.

A "jigger" is made by placing two rails, or pieces of lumber, sharpened at the ends, parallel with each other, of the same width of the track and fastened together with a pivot in the center. It is used for changing a hand-car from the track to the turnout. The car is placed upon it and turned on the turnout and when placed on the jigger the car ought to balance. A declaration alleged that the plaintiff was injured by carelessly and negligently running and pushing a certain hand-car upon the railroad-track. The court

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below over objection admitted evidence to prove that plaintiff was injured in consequence of the defective construction of a jigger, the pivot of the jigger being four inches from the center. The testimony should not have been admitted, as there was no allegation of the fact in the declaration. *Thomas*, 40/231.

Where the plaintiff alleged that when crossing at night a little bridge or crossway over the sidewalk covering a ditch two feet deep, he stepped in a hole between the outer planks of the crossing and the earth, fell into the ditch, and was injured; and the only act alleged tending to charge negligence against the municipality was that the bridge was badly constructed; and the evidence showed that the place where he was injured was not a bridge, but a sewer a foot and a half under the ground, and that he was injured by stepping into a hole made by a recent rain on the side of the sewer, and not by falling through the bridge, nor on account of its being badly constructed; a verdict in his favor was contrary to law, the state of facts on which he recovered being different from that alleged in the declaration. *Mayor, etc. v. Wilson*, 82/206. Cited, 86/631.

An allegation that the railroad company was negligent in not having a key placed in the bolt which fastened the tender of the engine, in consequence of which the bolt came out, the engine and tender separated, and the fireman was thrown between them to the ground and injured, is not supported by proof that the bolt was not long enough to go through so as to be keyed, and thereby prevented from coming out, and that the train was stopped and the engineer and fireman attempted to fasten the bolt, but it was so short that this could not be done. Whether on proper allegation there could be a recovery is not decided. *Tompkins*, 83/759. Cited, 86/631.

Inasmuch, however, as the plaintiff did not prove his case as laid in his petition, but, on the contrary, even by his own testimony, affirmatively showed that he could, by the exercise of ordinary care, have avoided the injuries for which he sued, and that the same were not really attributable to the alleged negligence of the railroad company, the verdict against the latter was unwarranted and should be set aside. *Barfield*, 115/724; 118/256. Cited, 123/237. Dis., 124/1052.

Where the record constrains the conclusion by this court that the plaintiff's own evidence does not sustain the theory set up in her

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declaration (that for the defendant being against this theory), this court must hold that a verdict rendered in her favor is an illegal one, and reverse the judgment of the court below denying the defendant's motion for a new trial containing the general grounds. Hunt, 116/449. Cited, 1 G. A. 175.

In *Stewart v. Mynatt*, 135/637, it was held that on the trial of an action against the proprietors of a public skating rink, for damages for personal injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendants, wherein the defendants, after denying generally all the material allegations of the petition, pleaded that the plaintiff's injuries, if any, were caused by her own negligence, it was not error for the court to instruct the jury, the plaintiff having made out a prima facie case, that "The burden is on the defendants to establish by a preponderance of the testimony that the plaintiff is guilty of any negligence which caused her injuries." Fish, C. J., said: "This is not a case where the plaintiff alleged certain acts of negligence on the part of the defendants, whereby the plaintiff was injured and damaged as specifically set forth, and where the defendants merely denied all of plaintiff's allegations in respect to the defendants' negligence and as to plaintiff's injuries, which would be in effect a plea of the general issue. In that kind of a case evidence in behalf of the defendant, which would equally balance the plaintiff's evidence, would be sufficient to defeat the action. In the case now before us the defendants not only denied all the material allegations in the plaintiff's petition, but set up an affirmative defense that the plaintiff's injuries, if any, were caused by her own negligence. Therefore, in accordance with the rule that 'The burden of proof generally lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proving of such fact is essential (Code of 1910, § 5746), the burden rested upon the defendants, after the plaintiff had made out a prima facie case, to show by a preponderance of the evidence, in order to sustain their plea, that the plaintiff's injuries were caused by her own negligence. When the plaintiff submitted evidence of the negligence of the defendants, as alleged in her petition, and that her injuries as set forth were caused thereby, and such evidence was sufficient to take the case to the jury, then she made out a prima facie case, and was not bound to go further and show her own diligence. Whether or not by the exercise of ordinary care the plaintiff could have prevented the injuries was a

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matter of defense. *Evans*, 87/673, 675 (13 S. E. 580), and authorities cited; *City Council of Augusta v. Hudson*, 88/600 (15 S. E. 678). See *Brandenburg*, 129/115 (58 S. E. 658)."

564. Court should charge as to evidence in without objection.

Although the allegations in a declaration may not warrant the introduction of certain evidence to establish a claim on the part of the plaintiff, yet if it be introduced without objection, it is proper for the court to charge as to its legal effect. In a suit against a railroad company for causing the destruction by fire of the plaintiff's fences and crops, by the careless running of its engines, evidence having been admitted without objection to show that the grass on the right of way of the railroad was set on fire by sparks from the engine, and that from this the fences of the plaintiff were burned, such evidence tended to show negligence on the part of the railroad. *Lawrence*, 74/534. Cited, 90/659.

In *Ratteree v. Chapman*, 79/574, *Simmons, J.*, said: "While the declaration does not charge, in words, that the injuries were permanent, yet from the allegations therein, it might properly be so construed. Evidence as to the injuries being permanent was admitted without objection. If proof be allowed to go to the jury without objection, outside of those alleged, we hardly think that the plaintiff should be held strictly to the allegata; no objection having been made to the admission of the evidence, and no motion to rule it out. The reason is obvious after verdict, because, by amendment, the declaration could have been amended so as to cover the admitted allegations." Cited, 126/61; 117/461.

In *Attaway*, 90/656, the plaintiff alleged that his injury was caused by a piece of steel which flew into his eye in consequence of the negligent use of defective tools by the overseer under whom he was working. The plaintiff's evidence tended to show that the negligence consisted in the manner of using them, as well as in the fact of having used them in their defective condition, and this evidence was not objected to at the trial. The court instructed the jury as to the right to recover for negligence in the manner of handling the tools, as well as negligence in having used them in a defective condition. It was held that where the declaration alleged that the plaintiff was injured by the defendant's negligence in using certain defective tools, the court was authorized to charge as to

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negligence in using them in an unskillful manner especially as the plaintiff was allowed to introduce evidence on this point without objection. Simmons, J., said: "If the allegations in the declaration did not cover negligence in the latter respect as well as in the former, the defendant ought to have objected, or moved to rule it out. Had it done so, it would have been allowable for the plaintiff to amend so as to make the declaration more specific; but, as the evidence on this point was allowed to come into the case and remain in it without objection, the court was authorized to charge the jury upon the case as developed by the proof. Where a party permits evidence to go to the jury without objection, upon a declaration that is ambiguous, and the jury find on such evidence, the party is not entitled to a new trial on the ground that the evidence does not correspond with the declaration, if the declaration could, by amendment, have been made to clearly cover the evidence; and certainly, if the jury could consider the evidence, the court was authorized to charge upon it as a part of the case. Cited, 97/669; 119/146.

By Lamar, J., in Grogan, 117/461: "Where in a suit for personal injuries damages are claimed for incapacity to labor, and for suffering, up to the time of the filing of the suit, but without objection evidence is admitted as to the pain, suffering, and incapacity to labor, up to the time of the trial, and the judge charges on such theory, a new trial will not be granted. If objection had been made at the time, the evidence should have been excluded, or the plaintiff could have amended. *Ratteree v. Chapman*, 79/574 (2)."

565. Evidence admitted without objection in doubtful cases.

When the plaintiff's declaration alleges that her husband was killed in a specified way by the negligent running of a particular train or engine of a railroad company, and the proof shows that he was killed by another engine of the company, and in a manner different from that alleged, and the evidence is such that, in any view of the case, the plaintiff's right to recover is very doubtful, a verdict in her favor should be set aside. Lumpkin, J., said: "The plaintiff's declaration alleges, in substance, that her husband was employed as a track-hand by the Central Railroad in its freight-yard at Macon; that while employed and engaged on one of its tracks a train came along thereon, and it became necessary for him to step from said track to avoid that train; that he did so, and stepped

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upon another track of defendant, and was run over and instantly killed by another engine and train of defendant upon the latter track. The proof showed conclusively that deceased was walking along a track of the railroad, and a freight-engine to which no train was attached came along behind him on that track, and ran over and killed him, and that he did not in an effort to avoid said engine, step off said track and get killed by an engine and train on another track. Evidence showing that the deceased was killed by a different engine, and in a different manner from that alleged, was admitted without objection. There being, then, a variance between the declaration and the proof as to the circumstances of the killing, and the evidence, as stated, having been admitted without objection, the question is presented whether or not a verdict in plaintiff's favor, based on proof not making a case strictly covered by the allegations of the declaration, should stand. We are all agreed that in a case like this, where the right to recover is, in any event, doubtful, the plaintiff should be required to make his proof correspond strictly with his allegations. That is to say, in a doubtful case, the defendant is entitled to all his legal rights, and, accordingly, to be accurately informed by the declaration upon precisely what state of facts, and for what kind of negligence, the plaintiff seeks to make it liable. If the plaintiff's right to recover was plain and manifest, the rule need not be so rigidly enforced." Hubbard, 86/623. Cited, 90/575, 660; 93/515; 119/845; 4 G. A. 317.

The action being by S. Herrman & Bro., and the evidence showing that the horse belonged to S. Herrman, with nothing to show that the brother had any ownership or interest, the declaration was not supported in respect to the plaintiff's title; and, as the evidence left it very doubtful whether the chief injury to the animal resulted from the defendant's negligence or from some unknown cause, the court erred in not granting a new trial. Herrman, 92/384.

In Fitzgerald, 108/507, it was held that on the trial of an action against a railroad company for a homicide alleged to have been caused by the negligent "kicking" of a car, it was, in the absence of evidence showing that a "running switch" and a "kick" were the same thing, erroneous to admit in evidence against the defendant one of its rules which related exclusively to running switches. The more especially is this true if it affirmatively appeared from the evidence that the two things were essentially different.

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566. When plaintiff may urge negligence not declared on.

A prima facie case of negligence on the part of the defendant, which the plaintiff's declaration covers, can not be effectually answered by a given state of facts, if those facts involve a breach of diligence by the defendant in a material respect; and such breach of diligence, if shown, may be urged by the plaintiff, not to recover upon, but to defeat the defendant's justification, although no reference to it is made in the plaintiff's pleadings. Lumpkin, J., said: "One ground of the motion for a new trial assigned as error the refusal of the court to charge the following written request: 'The plaintiff is confined to the allegations of negligence made in the petition. There is no allegation of negligence respecting the company's leaving any key in the possession of any employee, and you can not find for the plaintiff on that ground.' It is true that the plaintiff did not seek to recover because of negligence on the part of defendant in improperly leaving one of its switch-keys in the custody of a discharged employee; but because of the alleged negligent misplacement of a switch which caused the death of her husband. The plaintiff proved that the switch was misplaced, and that such misplacement was the cause of the collision. The defendant sought in reply to show that the misplacement of the switch was not due to its fault, but that the mischief was done by an evil-disposed person, not in its service. The plaintiff, in turn, endeavored to meet this defense by proving that the company was negligent in affording the evil-disposed person an opportunity to carry out his designs, and in not taking the proper steps to prevent their successful accomplishment; in other words, the plaintiff sought to break down the defense of the company by showing that the facts alleged and proved by it involved a breach of diligence on its part in a material respect. It is quite clear to our minds that the plaintiff had a right to urge such breach of diligence, not as a distinct basis of recovery, but for the purpose of defeating the defendant's justification, and this the plaintiff could do although she had not in her pleadings made any special reference to this particular negligence on the part of the defendant." Kane, 92/187. Cited, 102/338.

567. Variance as to the employment.

A petition alleging that the plaintiff was an employee of the de-

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fendant, and, as such, sustained personal injuries, through the defendant's negligence, while engaged in the work he was employed to do, is not sustained by evidence showing that the relation of master and servant did not exist between these parties, and that the plaintiff was really the servant of another person, and was doing the work in question under his employment by that person. Postell, 112/602.

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CHAPTER 36.

EVIDENCE.

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568. Evidence, relevancy of.

The evidence must relate to the questions being tried by the jury, and bear upon them either directly or indirectly. Irrelevant matter should be excluded. Code, § 5744 (5158).

569. Illustrations of the doctrine.

In Harris, 78/525, it was held that, at a former trial a different theory of defense was relied on was not relevant as matter of evidence, and Bleckley, C. J., said: "We think that the court ruled properly in rejecting this evidence. Just as the plaintiff may vary a line of attack (and did it in this case), so the defendant may vary his line of defense. Taking position in the field, and fighting one in that position, will not prevent a change; indeed, in the same trial the defendant may not only urge different defenses, but contradictory defenses. He may take all the chances in his favor, just as the plaintiff here relied upon one mode of killing at the crossing and another by falling from the cars. It is quite right; and there ought to be no grudging of latitude to bring out the truth, all the truth, and all aspects of it." Cited, 86/630.

In Owen, 90/265, the plaintiff was a fireman and he was injured in a collision of trains. He alleged that his train, without signal, notice or warning of any kind of the presence of another train or obstruction on the track, ran into a local freight-train that was standing on the track and which gave no notice or warning of any kind to approaching trains of its presence. The court allowed a witness to state that "the agent put out no signal, nor gave any warning to the second train; he never gave any at all; if he did I never saw it." It was held that this testimony was relevant and admissible under the allegations in the declaration.

In Georgia Cotton Oil Mill Co. v. Jackson, 112/620, it was held that when the parties to an action on trial were at issue as to whether or not a machine by which the plaintiff had been injured was, at the time he was hurt, out of order, and operating in a dangerous manner, evidence tending to show that shortly thereafter,

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and while in substantially the same condition, this machine operated in a similar manner, and by so doing injured other persons, was relevant. Lumpkin, P. J., said: "At the same time the court should have instructed the jury that all these witnesses stated with reference to this matter was relevant solely upon the question as to what was the condition of the machine at the time the plaintiff was injured."

In the trial of an action for damages by a passenger for being compelled to ride in a car occupied by disorderly passengers, evidence that the conductor in charge of the train had, prior to the time that the plaintiff became a passenger, made efforts to suppress the disorder was irrelevant, when the question to be determined was whether such conductor was diligent in the suppression of disorder which arose after the plaintiff became a passenger. O'Bryan, 112/127.

In Ware, 112/663, a husband sued for the loss of his wife's services, and a ground in the motion for a new trial was that the court erred in allowing one of the witnesses for the plaintiff to testify that a very dim light was kept burning in Mrs. Ware's room on account of her eyes, the objection being that the plaintiff did not allege in his petition that his wife had sustained any injury to her eyes. It appears from the record that on the trial the defendant attempted to show that Mrs. Ware had not been seriously injured, and was in nowise incapacitated from doing her ordinary household work. To this end men were employed to watch her room at night, and these witnesses swore that the room occupied by Mrs. Ware was very dimly lighted. The evidence objected to was introduced for the purpose of removing any suspicion of fraud that might attach to plaintiff on account of this dim light, and also as tending to show that the witnesses were in error as to the identity of the woman whom they testified to having seen actively engaged in work about the house. It was held that though the petition of a husband in an action for the loss of his wife's services, occasioned by personal injuries tortiously caused, may not allege that a particular physical infirmity resulted from such injuries, proof thereof may be received if, during the progress of the trial, the same becomes collaterally pertinent.

It is error to allow a witness in an action brought to recover damages for an insult, alleged to have been given on a street-car, to testify as to conduct of the conductor subsequent to the transactions

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alleged in the petition, and disconnected therewith. An objection to such testimony, that it was irrelevant and inadmissible, should have been sustained. *Baker*, 1 G. A. 832.

Where the condition of a set of harness is the subject of inquiry, it is error to overrule a proper objection to evidence as to the condition of a set of harness which is not identified as the one under investigation. *Porter Brewing Company v. Cooper*, 116/171.

It being a material matter of inquiry as to what was the condition of the headlight of the locomotive of the defendant's train at the time it was alleged to have struck and killed the plaintiff's horse, to recover the value of which this suit was brought, evidence tending to show the condition of the light at a point four or five miles distant from the place at which the animal was killed was not entirely irrelevant. *Hughes*, 127/593.

Where, in a suit against a railway company for damages, the jury returns a verdict in favor of the plaintiff, he can not justly complain of an erroneous charge touching his right to recover, or of any other error which did not operate to his prejudice. It can not, as matter of law or of fact, be assumed by a reviewing court that in such a case the jury would have found in favor of the plaintiff a larger sum as damages had not the trial judge improperly admitted proof of the irrelevant fact that all of the capital stock of the defendant company was owned by a single individual. *Peterson v. Wadley & Mount Vernon R. Co.*, 117/390.

On trial of an action against a street-railroad company, for damages on account of personal injuries received by the plaintiff while walking across a trestle, evidence that a person other than the plaintiff had been warned to keep the plaintiff and others off the trestle was, in the absence of anything to show that such warning was communicated to the plaintiff or was given in her presence, inadmissible to bind her with notice that the general public was not allowed on the trestle; and, being irrelevant to any issue in the case, it was not admissible as foundation for an impeachment of the witness. *Monk*, 118/449.

In *Renfroe*, 115/774, it was held, that a petition is not, for a stated reason, legally sufficient affords no ground for rejecting evidence directly tending to establish the plaintiff's allegations. *Fish, J.*, said: "Another ground of the motion for a new trial was, that the court erred in permitting the plaintiff to prove, over defendant's objection, the various items of damages set out in the third para-

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graph of the petition, the objection to the admission of such evidence being, that the petition 'did not set out the cause of action in orderly paragraphs and itemize the various items of damage by giving the amount and value of each.' There was no merit in this ground. The demurrer to the petition having been overruled, the plaintiff had the right to prove her case as laid. The evidence objected to directly tended to establish the allegations of the petition. If the petition was defective, demurrer was the remedy; and when the demurrer was overruled, error should have been assigned upon such ruling in the manner above indicated."

It not being alleged that the community where the injury happened was populous, and there being no allegation of negligence as to the running of the train through a thickly populated community, testimony that the engineer had knowledge that the place where the plaintiff was injured was in a populous community is irrelevant. *Hamnes*, 135/68.

In *Barnes*, 113/212, it was held that, proof of facts collaterally pertinent to the issue on trial is, though they are not alleged in the plaintiff's petition, admissible in his behalf. *Lumpkin, J.*, said: "The plaintiff, as a witness, minutely described his injuries and after stating in effect that they were very severe, testified further that he had never recovered from them, that his health was still seriously impaired, and that he continued to suffer constant and intense pain. He also testified, in substance, that he had resumed, as far as he was able, his ordinary work. In this connection his counsel asked him the question, 'What makes you work?' and he answered, 'I have got to do it; I have a wife and three children to support, and nothing to support them with but what I make by my work.' Upon objection by the defendant's counsel to this answer, the court ruled that while it was not material how many children the plaintiff had, and that the jury need not consider that, it was admissible for the witness to state that he had a family to support, as a reason why he kept up his work. To this conclusion we agree. The contention of counsel for the company, that the fact that *Barnes* had a dependent family in no way bore upon his right to recover and shed no light upon the measure of his damages, was certainly well founded; but this fact was relevant for the purpose of explaining his conduct, and, under the circumstances, had a direct bearing upon the weight and credibility of his testimony. He was on the stand asking the

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jury to believe that he was then and there still a sufferer from the injuries of which he complained, and at the same time informing them that he had, before the trial, entered upon the performance of his regular work, which he described as extremely arduous and laborious. Did he not thus subject himself to the charge of insincerity in claiming that he had not been restored to health and vigor? Who could fairly say he did not? Why, then, was it not legitimate and proper for him to explain this apparent inconsistency by stating that he was obliged to work in order to support his family? * * * The court allowed Barnes to testify as stated, solely for the purpose of explaining why, though professing to be a sick and suffering man, he kept up his work. It would have been entirely proper for the defendant's counsel to have requested a distinct instruction that the jury should not consider this testimony for any other purpose. This end could not, however, be legitimately accomplished by objecting to the testimony as irrelevant and inadmissible for any purpose whatever. At the time he was injured Barnes was, and for many years previously had been, the official stenographer of the Macon circuit; and he was, when the trial below was had, still holding this office. It was a part of his work to take down stenographic notes of testimony and afterwards write out such portions thereof as were needed. Over an objection that there was in his petition no allegation of damages 'by reason of the employment of typewriters,' he was permitted to testify that he had employed young ladies as typewriters, and that he was then paying one \$25 per month. While Barnes could not, of course, recover damages for which he had not sued, it was allowable for him to support by any competent testimony an allegation distinctly made in his petition that, because of his injuries, his capacity to labor had been diminished. He had, before being allowed to testify as just stated, sworn that on account of his injuries he had become unable to do in person all his work, and could no longer do that part of it which necessitated continued use of a typewriting machine. In view of this, it seems clear that the additional proof to the effect that he was obliged to employ help at least tended to show decreased power to labor, and the cost of the help was relevant as to the extent of the decrease. No point was made that the cost was not necessarily the value of the work for the performance of which Barnes contracted. The objection was simply as above stated, and it was not well taken. If, as above remarked, counsel for the defendant had de-

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sired to have the jury restricted in their consideration and application of this testimony, they should have taken the course there indicated." Cited, 115/724.

When the defendant to a case goes to trial on the petition and answer, and does not, by demurrer or appropriate motion in the nature thereof, challenge the legal sufficiency of the petition, it is not improper to try the case accordingly. Applying this well-settled rule to numerous grounds of the motion for a new trial in the present case, there was no error in the omissions to charge or in the instructions complained of. It appears from the motion itself that one of the propositions, the failure to charge which is complained of, was in fact given to the jury, and the omissions to charge related to matters which, under the pleadings, were not pertinent. The instructions excepted to, whether abstractly correct or not, were adjusted to the pleadings as they stood. Barfield, 115/724.

Since ordinary hearsay testimony is not only inadmissible but wholly without probative value, its introduction without objection does not give it any weight or force whatever in establishing a fact. Lumpkin, P. J., said: "Such testimony, save as to well defined exceptions, is inadmissible for any purpose, because it is wholly without probative value. The fact that it is admitted can not give it any such value. In other words, testimony of this character which does not come within any of the exceptions just referred to is, in legal contemplation, wholly worthless, and has been so regarded and treated through all the ages of the English law. While a party who permits hearsay testimony to be introduced without objection, or who has himself introduced such testimony, will not be heard to complain of the fact that it went to the jury, and must suffer whatever disadvantage may come of their giving it sufficient weight to turn the scale against him when there is enough legal testimony before them to support a finding in favor of his adversary, it will not do to say that such a finding, resting upon hearsay testimony alone, can lawfully stand merely because the losing party did not object to such testimony when offered by his adversary, or himself introduced the same. No plaintiff should ever, under any circumstances, lose his case when there is evidence to warrant a recovery by him, and the verdict or judgment in favor of the opposite party has nothing upon which to rest but inadmissible hearsay testimony." Eastlick, 116/48.

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570. Failure to produce evidence.

Where a party has evidence in his power and within his reach, by which he may repel a claim or charge against him, and omits to produce it, or, having more certain and satisfactory evidence in his power, relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded; but this presumption may be rebutted. Code, § 5749 (5163).

571. Failure to produce employees or witnesses.

Where it was shown that a cow was killed by a train, the railroad company should have produced all the witnesses present, to show that the company was not at fault. Where the engineer and fireman were always present on the engine, but only the former was sworn as a witness, and the absence of the latter was not accounted for, this was a circumstance from which the jury might infer that, had the other witness been introduced, his testimony might have shown negligence on the part of the company; and the verdict against the company was not without evidence to support it. Wall, 75/282. Cited, 77/442; 102/336. This not applicable in a suit for personal injury. 80/749.

If the engineer was introduced as a witness and the fireman was unaccounted for, this might authorize an inference on the part of the jury against the road, and they might believe that the fireman had been kept away because he knew something which might be detrimental to the company, but they were not compelled so to believe, and could believe the testimony of the engineer if they saw proper; and where the fireman was accounted for and produced in court, where he could have been examined by the plaintiff, such an inference could not be drawn because he was not sworn. Davis v. Hatcher, 75/645. Cited, 77/440; 102/324, 340.

In Culler, 75/704, it was held that where, on the trial, only the engineer was sworn for the defendant, to show the use of all ordinary and reasonable care, although he testified that the fireman was engaged in firing at the time, and where there was a difference of opinion about the distance at which the mule could have been seen, and there was some conflict between the testimony of the engineer and statements testified by other witnesses to have been made by him as to reversing the engine and blowing on the brakes, there was no abuse of discretion in refusing a new trial on the ground that the verdict was contrary to law and evidence. In such a case the pre-

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sumption against the company is a troublesome one to overcome, and to rebut it successfully it is better that the agents of the company stationed on the engine should all be called. Cited, 77/440.

In Gray, 77/440; 85/825, the action was brought to recover damages for killing a colt. Hall, J., said: "The company showed by one of its employees who was on the engine, that the colt jumped on the railroad-track so near the engine that no diligence would have availed on the part of those in charge of the train to prevent the collision. They did not introduce the engineer or fireman, however, or otherwise account for them than by showing that the engineer had quit the employment of the company, and gone to Florida, where his residence could not be ascertained so as to enable them to get his testimony. The fireman, at the time of the damage, was on the bottom of the tender, attending to his duties, and could not have seen the animal on the track; for as it was approaching the train, which was the fast mail train of the company, it was running at a high, though not unusual, rate of speed. And it further appeared that the engineer, had he been on the lookout, could not have seen the animal when it got on the track. There was no necessary conflict in the evidence of the plaintiff and the defendant in this case as to the manner of the killing, it not being contested that the colt was killed by the running of defendant's engine. The circumstances testified to by the plaintiff, and the account given of the actual occurrence by the railroad employee who testified, were not opposed to each other, and render his account of the circumstances of the occurrence altogether probable and true. The killing seems to have been the result of one of those sudden emergencies against which no foresight or prudence could have guarded. The only contention on the part of the plaintiff is that the presumption against the company was not overcome, because of its failure to introduce as witnesses all the persons who were in charge of the engine and tender; and it was held that a mere failure to introduce the engineer or fireman as a witness was not sufficient to warrant a verdict against the company. Cited, 102/337; 107/373; 113/180.

In Foster, 119/675, it was held that the admission, over the objection of a party, of hearsay evidence, the natural tendency of which was to discredit his witnesses and prejudice his case, requires the grant of a new trial, when it is applied for upon this ground. Fish, P. J., said: "L. O. Simmons, a witness for the defendant, testified that the names of the persons who were on the car that night were

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turned over to him, and he went to see them. The court then, over the objection of plaintiff's counsel, allowed him to testify as follows: 'I did not subpoena them, because they did not know anything about it. They said they did not know anything about the transaction, and so I did not need them.' * * * For the court—no matter what may have been his purpose in admitting this testimony—to allow Simmons, an agent of the defendant company, charged with investigating the case and looking for witnesses, to testify that he had received a list of the names of the persons who were on the car when it was alleged this occurrence took place and had seen these people, and they had told him they knew nothing about it, was to admit hearsay testimony the natural tendency of which was to discredit the testimony of the plaintiff's witnesses and to injure his case. * * * Neither the plaintiff nor the defendant was under any legal obligation to introduce as witnesses all the persons who were on the car at the time of the alleged occurrence, and so neither was required to account for the non-production of such persons as witnesses. Besides, if either had been under any obligation to account for the non-production of such persons, this was not the way in which to do it. If production were required, non-production could not be excused upon such a ground; and hearsay evidence would be none the less inadmissible. The way to account for the non-production of a witness is to show inability to produce him."

It is competent for a party to account for the absence of an eye-witness to the occurrence under investigation, that the jury may not draw any unfavorable inferences from the failure to produce and examine the witness. *Mason*, 123/773.

In *Bernstein*, 113/175, it was held that where it does not appear that either party has suppressed evidence within his power to produce, it is error to charge the jury as follows: "It is the duty of parties bringing cases into court, whether plaintiff or defendant, to furnish the best evidence at their command and to furnish witnesses cognizant of the facts. Parties can explain the reasons for not producing the witnesses; if not explained and not produced, the presumption is that they would not sustain the contention of the party." *Simmons*, C. J., said: "The defendant had introduced as witnesses several of its employees who had participated in doing the blasting. It could have been inferred from the evidence that the defendant had a large body of workmen employed where the blasting was going on, but it did not appear either that the men not introduced knew

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anything of the matters in issue or that such men were at the time of the trial within the control or even in the employment of the defendant. Even had all of these men been cognizant of the facts and accessible to the defendant, there was no duty on the defendant, after introducing several witnesses to support its contentions, to add to their evidence the cumulative testimony of every other of its employees. It had a perfect right to rest its case whenever it believed it had introduced enough evidence to establish its defense. It would then have to suffer the consequences if the jury deemed this evidence insufficient, but it would have failed in no duty, and no presumption could, on that account, arise against it. It would have been improper even to charge the provisions of § 5749 (5163) of the Code; for 'it could not be said that the [defendant] had more certain and satisfactory evidence in [its] power to sustain [its] contention and yet relied on that which was of a weaker and inferior nature,' even if the employees not introduced had been shown to be cognizant of the facts and within the power of the defendant. *Anderson*, 107/500. It was all the more improper in a case like the present, where it did not appear that the employees not introduced knew anything of the material facts, or that they were within the power or control of the defendant, to charge that there was any duty to furnish witnesses, or that an unexplained failure to do so could raise a presumption against the party. 'Where it does not appear that the party holds back evidence within his power to produce, the non-production of more full and definite evidence than he presents raises no presumption against him; and there should be no charge given to the jury on the subject of such a presumption.' *Schnell v. Toomer*, 56/168. See also *Gray and Weinkle, supra*." Cited, 1 G. A. 176.

In *Shields*, 1 G. A. 172, *Hill, C. J.*, said: "In the next place it is said that 'the court erred in failing to charge the jury on the law applicable to the failure of the party to produce evidence that it is in his power to produce, it appearing, on the trial of the case, that the motorman of the car on which plaintiff was riding was in court but was not sworn for defendant.' The evidence in the record fails to disclose any fact or circumstance indicating that the motorman saw or knew anything about the accident. The defendant introduced the conductor and four passengers who testified that they saw everything that happened when the plaintiff was injured. We do not think, therefore, that there were any facts which would have required, or even warranted, the court in charging § 5749 (5163) of the

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Code. Where it does not appear that the party holds back evidence within his power to produce, the non-production of more full and definite evidence than he presents raises no presumption against him; and there should be no charge given to the jury on the subject of such a presumption. Bernstein, 113/175 (5). In this case it appears that the defendant did as a matter of fact introduce the most satisfactory evidence in its power, and it would have been error against the defendant if the court had charged the section of the Code, *supra*."

572. Subject continued.

In Holcombe, 88/9, the main question was whether a stool used for assisting lady passengers to enter the train was in the wrong place and caused the injury. The servant whose duty it was to look after the stool, was not offered as a witness, and it was held, it not appearing that the witness who would ordinarily know the fact in question, and who was one of the employees of the company at the time the cause of action arose, was inaccessible, or that the defendant was ready to produce him, there was not error in calling attention to his absence or non-production in charging the jury as to a fact to be considered by them in connection with the case. Lumpkin, J., said: "In view of the repeated rulings of this court, we see no reason why there should be any impropriety in the court's calling the attention of the jury to the absence or non-production of a witness who ought to have special knowledge concerning the particular fact under investigation. It appears by an affidavit attached to the motion for a new trial that the witness who ought to have known about the location of this stool at the time of the injury had been subpoenaed by both sides, and was actually in court; but, this fact not being known to the court, its charge on this subject was properly given. The defendant could easily, during the trial, have informed the court of the presence of the witness; and, if this had been done, the charge complained of would doubtless have been omitted.

The defendant, on the trial of an action against a railroad company for personal injuries, having introduced testimony tending to show that the plaintiff's impaired physical condition was the result, not of the injuries alleged in the declaration to have been sustained, but of rheumatism, which he had contracted, and from the effects of which he had suffered, long before such alleged injuries occurred, there was no abuse of discretion in allowing the plaintiff, after testi-

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lying in rebuttal that he had never been afflicted with rheumatism prior to the time he was injured, to account for the absence of his wife from the trial by stating that she was detained at home by the sickness of her children, it being manifest she had knowledge of facts which would make her an important witness concerning this issue, and the court stating, in effect, that the testimony explaining her absence was admitted only because the non-production of her as a witness might be the subject of unfavorable comment against the plaintiff before the jury. Garner, 91/27. Cited, 102/338; 123/277. Dis., 119/675.

In Morrison, 102/319, it appeared that Waters, who was an employee of the defendant in the capacity of fireman at the time when the injuries in question were sustained, and who had excellent opportunities for knowing the truth of the matter, was not introduced as a witness at the trial. He was, however, at the instance of the company, present in court, and this fact was known to the plaintiff's counsel. The latter, in his argument to the jury, contended that the failure of the defendant to introduce and examine this witness was a circumstance from which an inference could be drawn that, if he had been so introduced and examined, he would have testified to facts prejudicial to the defendant. The court was requested to compel the plaintiff's counsel to desist from making such an argument, on the ground that it was improper and illegal, and was also requested to declare a mistrial because of such "improper argument." The court held that the argument was not improper, and refused to declare a mistrial because of it. It was urged that these rulings were both erroneous, for the reason that when the defendant produced the witness in court, so that he could have been introduced and examined by the plaintiffs' counsel, if he had chosen to do so, there could be no proper inference that he knew anything which would be detrimental to the company. It was held that where, in the trial of an action for damages against a railroad company for personal injuries, the evidence as to the company's alleged negligence was conflicting, it was legitimate for the plaintiff's counsel to argue to the jury that the failure of the defendant to introduce and examine as a witness one of its employees, who was present at the time when the injuries in question were sustained, was a circumstance from which an inference could be drawn that, if this employee had been introduced and examined, he would have testified to facts prejudicial to the defendant. This is so, whether the counsel's contention

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as to this matter was, under all the circumstances in proof, well founded or not; nor was such argument out of order because defendant's counsel had caused the employee in question to be present in court, so that he could have been introduced and examined by the plaintiff's counsel. If, in view of the entire evidence, it was incumbent upon the court to give to the jury any instruction with reference to the defendant's failure to examine such employee as a witness, it was certainly right to refuse to give in charge a request to the effect that the production of the employee in court by the defendant was sufficient to relieve it of any presumption or inference that, in case he had been examined, he would have sworn to facts showing negligence on the part of the defendant. *Simmons, C. J., dissenting. Cited, 107/373.*

Where it was alleged that a given person got upon the defendant's train with the decedent, and on the trial such person was sworn and called to the witness-stand by the plaintiff, but withdrawn by him without being examined, and there was nothing to show that he was in any way under the power and control of the plaintiff, it was error to give this section in charge. *Anderson, 107/500.*

In *Winkle, 107/367*, it being an action for the killing of live stock, the judge charged the jury that "When an accident of this kind happens, the law makes it the duty of the railroad company to produce all of its employees who were engaged in running the train." This was error, and *Cobb, J.,* said: "The law does not make it the duty of a litigant to produce witnesses; and this applies to railroads as well as to natural persons. The law will sometimes allow inferences unfavorable to a litigant to be drawn by the jury from the fact that witnesses who are accessible are not called and sworn. It is, however, no breach of duty on the part of a litigant to fail or refuse to produce witnesses to sustain a complaint or to prove a defense. If he fails or refuses to produce witnesses that are accessible, he must take the consequences resulting from the jury drawing an inference that such failure or refusal was caused by the fact that such witnesses would, if produced, have testified to facts prejudicial to him. But no presumption will ever arise prejudicial to the party failing to produce the witness, provided the jury are satisfied from the evidence before them that the party who had such witness accessible has nevertheless proved his claim or established his defense. The failure to call and have sworn witnesses who are accessible and peculiarly within the power of a party will authorize

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argument by counsel before a jury, that in case the jury be in doubt as to the truth of the transaction they might infer that the absent witnesses, if in court, would have furnished evidence prejudicial to the party who has failed to produce them. If a litigant sees proper to rest his case upon one witness, although many others may be accessible, he has a right to do so, and the law imposes upon him no duty to do otherwise. Therefore the law does not require a railroad company to produce all of its employees who were engaged in the running of a train the operation of which caused damage to any one, when a suit growing out of such alleged damage is on trial. If the jury believe that the defense is established out of the mouths of the witnesses called, they should not find against the company solely on the ground that there were other witnesses to the transaction who were not produced. Cited, 119/336; 113/180.

The defendant may invoke and use allegations beneficial to himself made in plaintiff's declaration without offering the declaration itself in evidence, or otherwise proving the admissions contained in such allegations, and no unfavorable inference can properly be drawn against a corporation because of a failure to call as witnesses its own employees to prove the existence of facts shown by such admissions. Kane, 92/187. Cited, 102/338.

573. Burden of proof and preponderance of evidence.

The burden of proof generally lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential. If a negation or negative affirmation be so essential, the proof of such negative lies on the party so affirming it. Code, § 5746 (5160).

What amount of evidence will change the onus or burden of proof is a question to be decided in each case by the sound discretion of the court. Code, § 5747 (5161).

Preponderance of evidence. By preponderance of evidence is meant that superior weight of evidence upon the issues involved, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue, rather than to the other. Code, § 5731 (5145).

How determined. In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances

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of the case, the witnesses' manner of testifying, their intelligence, their means, and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, and the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may legitimately appear from the trial. The jury may also consider the number of the witnesses, though the preponderance is not necessarily with the greater number. Code, § 5732 (5146).

The case of Davis, 60/329, was brought to recover damages for an injury inflicted by a collision of trains. The plaintiff was under two months old at the time of the injury, and it was alleged that, in addition to other injuries sustained she had been made permanently deaf and dumb. Bleckley, J., says: "The burden of making out a case was upon the plaintiff. A material part of the case contended for was the ability of the child to hear before the injury complained of was received. There may be a general presumption that the ordinary human faculties are possessed by every individual. But here there was evidence that the parents of the individual were both deaf and dumb. The presumption referred to, thus became entangled with something like another presumption, that like produces like. The charge of the court, 'if the evidence be equally balanced for plaintiff and defendant, on any contested point, the jury should find that part of the case for the defendant,' was not erroneous, the great pressure of the case being on the question whether the child was deprived by the injury of the sense of hearing." Cited, 128/248.

The case Howard, 79/44, was brought by the plaintiff to recover damages for the death of her husband. The defendant requested the court to charge: "The burden of proving to you that the dead man was her husband is now on the plaintiff, and the defendant is not under the burden of proving that he was not her husband, or of showing where her husband is. The plaintiff is required to convince you that the dead man was her husband." Bleckley, C. J., said: "The court, instead of giving that request, gave, in its general charge, instructions that to recover it was necessary for the plaintiff to prove the affirmative of these propositions; in other words, the court told the jury that the burden of proving these things was upon the plaintiff. To say that the burden of proving a fact is on the plaintiff implies that there is no burden on the defendant to establish the nonexistence of such fact."

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In the absence of a timely request, it is not necessarily reversible error for the trial court to omit to charge upon the burden of proof. In a case where complaint is made that no instructions are given as to the burden of proof, the general rule, that he who assigns error must show not only error but that the error was hurtful to him, should be applied. Wright, 6 G. A. 172.

On an issue as to whether a party had been induced to sign a contract by fraudulent misrepresentations, the mere failure to specifically instruct the jury that the burden was on him who attacked the contract to show that it was so procured was no cause for a new trial, when the court charged generally that the burden of proof lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential. Goodwin, 120/83.

The judge may properly instruct the jury that in determining where the preponderance of the evidence lies, they may consider the personal credibility of the witnesses, so far as it has appeared from the trial. Henderson, *et al.*, 6 G. A. 385.

In Jones, 132/189, it was held that the court did not err in charging, that "Whenever it is shown you by evidence that the plaintiff's husband [the deceased] was free from fault and was not guilty of any negligence, * * * that * * * contributed to the cause of his death, then the burden would be shifted," and that in establishing one of the two defenses open to it the defendant would be required to do so by a preponderance of the evidence. After citing the cases of Bryans, Kelley, and McDade, *supra*, Beck, J., said: "Under these decisions, the court did not err in instructing the jury that when the plaintiff showed himself free from fault he had made a prima facie case, and that the burden of proof was then shifted to the defendant company; and when that burden was thus shifted to the defendant, it could only be successfully carried by establishing the defense relied upon by a preponderance of the evidence. In the case of Cleghorn *v.* Janes, 68/87, it appears, from the statement of facts, that the trial court charged the jury that: 'In all cases where the burden is upon a party, he must remove that burden by a preponderance of proof. Two witnesses of equal credibility swearing, the one one way and the other the reverse, does not remove the burden. So in this case, if Cleghorn swears the relinquishment was made, and Janes swears it was not made, if both are equally credible and unimpeached, the relinquishment is

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not legally proved.' While this charge was disapproved because of the unqualified statement of the rule contained in the last two sentences quoted, the court approved the charge as to the remainder of it. And in *Lanier v. Huguley*, 91/791 (18 S. E. 39), it was said: 'The party upon whom the law casts the burden of proof can not make out his case or defense by evidence which simply raises a doubt as to the matter in issue or leaves the proof equally balanced in the minds of the jury.'"

Failure upon the part of the court to define such expressions as "ordinary and reasonable care and diligence," and "preponderance of the evidence," there being no written request to instruct the jury as to the meaning of those expressions, is not error. *Jones*, 132/189. Cited, 133/134.

574. When the burden is shifted.

The party on whom the burden of proof rests is entitled to the aid of all legal presumptions arising out of the facts established, and, if these presumptions, added to the established facts, make a *prima facie* case, the burden is shifted to the other party. *Powell*, 89/601. Cited, 95/687.

575. Positive and negative testimony.

The existence of a fact testified to by one positive witness is to be believed, rather than that such fact did not exist because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired. This rule does not apply when, two parties having equal facilities for seeing or hearing a thing, one swears that it occurred, the other that it did not. Code, § 5751 (5165).

576. The rule and illustrations of it.

Where witnesses are equally credible, and their testimony otherwise entitled to equal weight, greater weight and credit should be given by the jury to those whose means of information were superior; and also to those who swear positively to a fact, rather than to those who swear negatively, or to a want of knowledge or a want of recollection. This rule, however, is to be taken with this qualification: Where one or more witnesses swear positively to a fact, such as that a bell was rung, or warning given by the voice crying out,

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and one or more witnesses having equal means of information and equal opportunity of knowing the fact, whether it occurred or not, and who bestowed equal attention upon the subject, swear that it did not occur, both sets of witnesses are to be treated as giving positive testimony. Freeman, 83/583.

Where the direct issue between the parties in an action for damages against a railroad company was as to whether on the approach of a train to a station the company's agent exhibited only a white light, indicating that the road was clear and that the train might proceed without encountering collision or obstruction, or whether the agent also exhibited a green light under the white one, indicating that the train should proceed with caution and that there was another train on the road between the approaching train and the next station, and both sets of witnesses testified with equal positiveness, the question of positive and negative testimony was not involved and a charge on such question was, therefore, not required. Bowers, 86/22.

The evidence of a witness who testified that a given thing occurred is positive testimony. The evidence of another witness that he was present on the occasion referred to, and did not see or hear the occurrence in question, is negative testimony; nor is such testimony rendered positive by a mere statement of the witness that such an occurrence could not have taken place without his seeing or hearing it. To entitle his evidence, other things being equal, to as great weight as that of the former witness, it must appear that his opportunities for seeing or knowing what occurred were at least equal to those of that witness, and that his attention was specially directed to the matter in question. Killian, 97/727.

The general rule as to the probative value of positive and negative testimony is subject to the qualification that other things are equal and the witnesses are of equal credibility. Bigham, 105/498.

When the evidence is conflicting as to whether a particular thing did or did not occur, and the trial judge instructs the jury that the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired, he should also give instructions to the effect that in weighing the testimony of the witnesses the jury should pass upon their credibility. O'Neill, 127/685. Cited, 128/76; 3 G. A. 143.

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The material evidence upon the issues in this case was of such character as to render it proper for the court to charge the law relative to the difference between the weight to be attributed to positive testimony and that to be attributed to negative testimony. While instructing the jury upon that subject, the court charged broadly that 'positive testimony was to be believed in preference to negative testimony, without giving in connection therewith the appropriate, qualification relative to the credibility of the witnesses. Such omission rendered the charge erroneous. *Orr*, 128/76. To the same effect, *Sowell*, 3 G. A. 142.

It is not error to charge that positive testimony is rather to be believed than negative, with the qualification that "other things are equal and the witnesses are of equal credibility." *O'Bryan*, 119/147.

A charge to the effect that the testimony of a witness testifying positively is entitled to more weight than that of one who testifies negatively is open to serious criticism unless it embraces an instruction that the jury, in weighing the testimony of such witnesses should consider and pass upon the question of their credibility. *O'Bryan*, 115/659. Cited, 119/151.

The affirmative and positive testimony of witnesses as to the actual facts of a particular occurrence can not be overcome by testimony which is negative in character, or consists of mere opinions. *Hambright*, 112/36.

577. Positive testimony overcomes consistent circumstantial testimony.

In *Frazier*, 108/807, it was held that when a plaintiff's right to recover depended upon the establishment of a particular fact, and the only proof offered for this purpose was circumstantial evidence from which the existence of such fact might be inferred, but which did not demand a finding to that effect, a recovery by the plaintiff was not lawful, when, by the positive and uncontradicted testimony of unimpeached witnesses, which was perfectly consistent with the circumstantial evidence relied on by the plaintiff, it was affirmatively shown that no such fact existed.

578. Tickets, existence of, shown by parol.

The fact that a passenger bought a ticket to pass over various lines of railroad from New York to Macon, Georgia, with coupons attached, and did so pass, may be shown by parol, independently of

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the ticket, the contents of the ticket not being involved. Wolff, 74/664.

579. Experts.

The opinions of experts on any question of science, skill, trade, or like questions, are always admissible; and such opinions may be given on the facts as proved by other witnesses. Code, § 5876 (5287).

One who is a graduate of a college where anatomy and physiology are taught, and who is engaged in the practice of osteopathy and has gained experience in the treatment of nervous disorders, may be examined as an expert witness, upon these facts being made to appear, notwithstanding he is not a licensed physician and does not administer drugs to his patients. Evans, J., said: "Not being a licensed practitioner, it was necessary to lay the proper foundation showing him to be an expert as to the subjects on which he proposed to express his opinion. We think the necessary foundation was laid. 'The opinions of experts on any question of science, skill, trade, or like questions, are always admissible.' Code, § 5876 (5287). 'An expert is one possessing, in regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons.' 12 Am. & Eng. Enc. L. (2d ed.) 424. 'This knowledge may be derived from experience or from study and direct mental application.' Id. 425. 'Strictly speaking, an "expert" in any science, art, or trade, is one who by practice or observation has become experienced therein.' Rogers on Expert Testimony (2d ed.) 2. But generally nothing more is required, to entitle one to give testimony as an expert, than that he has been educated in the particular trade or profession. Id. 4; 1 Gr. Ev. § 440. Knowledge gained by consistent and close study of medical works renders one competent to testify as an expert concerning the matters of which he has thus learned. White v. Clements, 39/232; Boone, 93/662. It is not essential that he should be actively engaged in the practice of medicine. Everett v. State, 62/71; 12 Am. & Eng. Enc. L. (2d ed.) 426. Nor is it essential that one who really has a scientific education on the subject should be a graduate of 'any medical college, or have a license to practice from any medical board.' Id. 100 (1). What he knows is what really qualifies him to express an opinion as an expert, and a diploma or license is important only as furnishing satisfactory evidence of his competency

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as a witness. Accordingly, a 'person who is neither a physician nor surgeon can express an opinion on a medical question, when the matter inquired about lies within the domain of the profession or calling which the witness pursues.' *Id.* 105 (9)." *Mason*, 123/773.

The testimony of the engineer of the backing train, that at the time he struck the car in which plaintiff was at work he was moving back at the usual speed necessary for switching and making couplings of that character, was properly admitted. *Code*, § 5876 (5287). *Goodwyn*, 2 G. A. 470.

Where one of the questions to be determined was the cause of the sudden, automatic starting of machinery of a certain kind, the opinion of a witness familiar with the construction and operation of similar machinery, describing a condition of the machinery which would be likely to cause such sudden movement, would be admissible testimony. *Cochrell v. Langley Manufacturing Co.*, 5 G. A. 317.

580. Laying the foundation for expert testimony.

The rule as to laying the foundation for expert testimony applies only to one who is unacquainted with the facts and their surroundings. Where one has this knowledge of the facts and their surroundings, he may give his opinion by showing the reason for it, whether he be an expert or not. *Killian*, 78/749.

581. Mode of examining an expert.

The proper mode of examining a physician or expert, where he is not testifying from his own knowledge, is to ask him hypothetical questions. *Southern Bell Tel. Co. v. Jordan*, 87/69.

An expert may be asked his opinion of a hypothetical case, even though the facts thereof may be the same as those of the case on trial. *McClifford*, 120/90. Cited, 127/400; *Bradley*, 125/193.

In a suit on account of personal injuries, if witnesses are put under the rule and excluded from hearing the testimony, there is no error in refusing to allow a physician, summoned as a witness by the defendant, to hear the plaintiff's testimony, so that he may be used as an expert witness in regard thereto. The proper practice is to examine such expert witness by propounding hypothetical questions adjusted to the evidence in the case, or some of it. *Lump-*

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kin, J., said: "Expert witnesses who have not knowledge of the actual facts of the case may be examined by hypothetical questions adjusted to the case presented by the evidence, where the question involved is one of opinion. If the expert gives his opinion on the basis of his own observation of facts personally known to him, this should be made to appear. If not, the proper mode of examination is by hypothetical questions, so that the jury may know what facts are assumed to be true as a basis of the opinion." Johnson, 127/392.

582. Scope of the rule allowing expert testimony.

In Hicks, 95/301, the plaintiff, an employee of the railroad company, was engaged as a plumber in placing a gas-pipe, and he alleged that he was injured by the negligence of a coemployee who was aiding in handling the pipe. A witness for the plaintiff was asked, as an experienced plumber, from the statement of facts he had heard in connection with it, what, in his opinion, caused the pipe to fall, and answered, "I can hardly see any other reason than the way he describes; that is, his assistant behind him let go the pipe." He was further asked: "What would be the effect of sixteen feet of pipe held at one end on a stick if one man let go—what would be the result to the man on the ladder if he had the pipe on his shoulder, as described?" and answered, that as to his own balance, it would have a tendency to throw him off. The testimony was admitted, over objection. It was held that the rule of law which admits as evidence the opinions of experts is limited in its application to those cases only where the question at issue is one of opinion, involving some particular matter connected with a special art, trade, or science, and to the opinions of those persons who from accurate knowledge of the particular art or trade, or thorough understanding of the particular science, are supposed to be able to speak with precision concerning the same. Therefore, where the question at issue is one of fact, involving none of the mysteries of a particular craft, but only such matters connected therewith as are easily within the comprehension of reasonably intelligent men engaged in the ordinary pursuits of life, opinions of experts thereon are not admissible, though the fact under investigation may be in some way connected with such particular trade or calling.

In Stancel, 118/142, Simmons, C. J., said: "The contention upon

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which the defendant mainly relied at the trial was that the plaintiff sustained only a few slight bruises as a result of the collision, and that the ailments of which he complained were brought about, not by the slight injuries he received at that time, but by the infirmities of old age or other independent causes for which the company was not responsible. The plaintiff, on the other hand, insisted that the injuries received by him while riding on the defendant's train were of a serious and permanent character and had incapacitated him from performing labor of any kind. A physician who was sworn as a witness in behalf of the plaintiff testified: 'From the examination I have given this man, I would say the disease he has now is what is called traumatic neurosis. * * * Neurosis is a suspended condition of the nervous system. It is like nervous prostration. By 'traumatic' is meant that this condition is attributed to some accident, physical violence or shock. Neurosis is a thing that frequently exists from a number of causes other than shock; so that in determining whether a thing is traumatic neurosis or not, you must have regard to its history. The symptoms are similar whether it be from shock and violence or from disease.' On cross-examination of this witness, the defendant company elicited from him the statement that 'anything' that would keep the matter [an injury] before a man's mind, like the matter of attending court or keeping his injury before him for the purpose of trial, retards recovery; and frequently, when that is removed, recovery is very rapid.' Counsel for the plaintiff, on redirect examination of the witness, asked him the following question: 'Do you think his condition of mind is what produces the disease, or the physical injury?' The witness answered: 'I think it is both.' Plaintiff's counsel then asked: 'Isn't that condition of mind superinduced by the physical injury?' To this latter question defendant's counsel objected on the ground that the answer solicited was a matter to be passed on by the jury; but the objection was overruled by the court, and the witness was permitted to testify: 'The rule is with this condition, and I think with this man, the shock he has sustained has caused him to a certain extent to be afraid of what might happen to him, together with the injury he did sustain. In my opinion, this condition of mind was caused by the accident.' Exception is taken to the ruling of the court just stated. We think the question propounded to the witness was entirely legitimate and proper. He was introduced as an expert whose opinion,

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because of his professional knowledge and experience, was entitled to much weight; had testified that he had made a careful and painstaking examination of the plaintiff and found him to be suffering from a disease technically known as 'neurosis;' counsel for the defendant had been permitted to elicit from the witness a statement to the effect that the bringing of a suit for damages by one suffering from that disease was calculated, because of the worry and anxiety incident to attending court and prosecuting his claim, to retard his recovery; and the witness had further testified, in substance, that the condition of the plaintiff's mind, as well as the physical injury sustained by him, brought about and produced the disease from which he was then suffering. Whether or not 'that condition of mind [was] superinduced by the physical injury' was an all-important matter to be inquired into and determined by the jury. The witness had, he testified, taken particular note of the character and extent of the physical injuries the plaintiff had received; and we have no hesitation in holding that it was perfectly competent for this witness to give his opinion, as a medical expert, that the plaintiff's 'condition of mind was caused by the accident.' "

Where in a suit for a personal injury a physician examined the injured party on several occasions, and on the trial gave testimony by answers to interrogatories as to the results of his examination and his opinion in regard to the condition of the plaintiff and of the extent and probable permanent character of the injury, there was no error in refusing to rule out his entire evidence because on cross-examination he stated that his opinion was based both upon a personal examination and the report made to him by another physician accompanied by a sciagraph, the witness also stating that the condition of the spine of the person examined was evidently the result of an injury, and that his opinion was based upon personal examination independent of the sciagraph, and was simply confirmed by it and the report of the other physician. *Maddox*, 131/799.

583. Illustrations of the doctrine.

Where a witness testified that he did not know what the rules of the company were, but proposed to state that formerly he was an officer of the company, and that no conductor or other officer had the right to order an employee to get on or off a moving train, and

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that if such order were given, the employee would not be required to obey it, such testimony was properly rejected. It is not matter for expert testimony to show that no railroad employee is required to get on and off a train while in motion; that neither the conductor nor any other officer can require an employee to get on and off a moving train, and that if such order is given, the employee is not required to obey it. *DeBray*, 71/406. Cited, 87/378; 111/713.

Whether or not the plaintiff was an expert, his opinion as to the propriety of his own conduct on the occasion of the injury, was not admissible testimony. *Hudson*, 85/203.

One question in a case being whether an engine could be stopped under certain circumstances, an expert who testified on that subject could give his reasons for what he stated, and for the purpose, by way of illustration, state what he had known to be done under even more difficult circumstances. *Dorsey*, 68/228.

The opinion of one, who for many years has been a railroad superintendent, in a matter within the scope of his employment, stands upon the footing of the opinion of an expert; but he can not give his opinion of the object of a railroad company, with which he had no connection, in putting up a notice on the doors of its cars that "passengers must not stand on the platform." The words stand for themselves. The witness was improperly allowed to testify that on railroads with which he had been connected, the object of such notices was only to keep passengers off the platforms when the train was in motion. *Johnson*, 38/409.

584. Books, and information from them.

A scientific expert may testify in respect to the character of cuts and embankments, slopes, etc., though his information about them be derived much from books. This witness was a civil engineer who had surveyed railroads, including the particular road at the place of the accident involved in this case. *Mitchell*, 63/173. Cited, 93/664.

Books of science and art are not admissible in evidence to prove the opinions of experts announced therein. *Erickson on Concussion of the Spine* was offered and rejected in this case. The objections to the testimony, as stated by *Atkinson, J.*, are that experiment and discovery are so constantly changing theories on scientific subjects that the books of last year may contain some-

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thing which this year everybody rejects as absurd; that the book may be a compilation of a compilation, and be thus hearsay evidence of the most extreme kind, and that the authors do not write under oath and can not be cross-examined as to the reasons and grounds for their opinion. Johnston, 95/685. Cited, 103/386.

It was competent for a medical expert to testify that, in his opinion, a given disease "may be cured by a surgical operation, but it is very rarely the case that this can be done," though the witness further testified he had no experience in treating that disease, but derived all his knowledge on the subject from reading medical authorities. Lumpkin, J., said: "Taking, as a whole, the testimony of the witness as it appears in the brief of evidence, it amounted simply to a statement by him that, in his opinion, the disease in question could, in rare instances only, be cured by a surgical operation, and that this opinion was based entirely upon his reading medical works recognized as authorities. We think the evidence was properly received. The opinion of an expert as to what conclusions may be properly drawn from statements in scientific works pertaining to his profession amounts to something more than mere hearsay, and may be very valuable in elucidating a given scientific inquiry. An opinion thus formed and given to the jury is quite a different thing from reading to them mere extracts from the books themselves. The latter might not be intelligible to the non-professional mind, while the opinion of an expert, expressed in language adapted to their comprehension, might be easily understood by the jury, and is, moreover, not only the result of study and deliberation, but an exercise by the witness himself of his own trained mental faculties upon the question involved. The doctrine is thus broadly stated in Lawson on Expert and Opinion Evidence (pages 176, 177): 'An expert may testify to an opinion of his own derived from books'—and the authorities there cited seem to sustain the text." Mayor, etc. v. Boone, 93/662. Cited, 123/778.

585. Opinions of witness.

Where the question under examination, and to be decided by the jury, is one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor; but, if the issue is as to the existence of a fact, the opinions of witnesses generally are inadmissible. Code, § 5874 (5285).

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the facts and circumstances are capable of being clearly detailed and described so that the jurors may be able readily to form correct conclusions therefrom. *Mayor, etc. v. Wood*, 114/370. Cited, 120/80; 121/783; 125/368; 129/174. Same effect, *Hoodenpyle*, 129/174.

In *Goodwin*, 120/83, Fish, P. J., said: "A witness for the defendant testified that he was the general yardmaster of the defendant's yard where the plaintiff was injured, during the time he worked there and for some eight years previously; that witness had been in the yardmaster's business for some ten years; that 'lumber properly loaded in the manner I have described will often shift by the momentum, so that in the end it might project over the end of the cars; and I have seen many cars down there with the lumber projecting.' He was asked by counsel for the defendant, 'Could or not a man work down there for thirty days in the yard without seeing lumber in that way?' He answered, 'No sir, I know he couldn't.' The court ruled out the question and answer, and in the motion for a new trial error was assigned upon this ruling. The point is clearly without merit, as the general rule is well established that opinion evidence is not competent when all the facts and circumstances upon which the opinion is founded are capable of being clearly detailed and described, so that the jury may be able readily to form correct conclusions therefrom." The court held as in *Mayor, etc. v. Wood*, *supra*.

Whether a person could or could not have known a fact is a matter for the determination of the jury from the circumstances disclosed by the evidence, and not for the expression of an opinion by a witness. *Mayor and Council of Milledgeville v. Wood*, *supra*. *Southern Cotton Oil Co. v. Skipper*, 125/368.

Questions as to the passage of time and the speed of trains usually involve opinions, and therefore testimony to the effect that a period was but a short time, or that in the opinion of the witness a train was running at a rate of four or five miles per hour, is competent. *Strickland*, 116/439.

586. Opinion of witness when facts are stated on which it is based.

In *Johnson*, 38/409, a witness was allowed to state over objection: "It is my opinion Johnson could not have been in his seat at the moment of collision, but was at the door or on the platform."

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Error was assigned upon its admission. Whether Johnson was standing on the platform at the time of the collision was a question of fact in the case. The headnote on the subject is this: "Though opinions are not generally evidence, yet, when the truth sought to be ascertained is matter of opinion, a witness, not an expert, may give his opinion if he states the facts upon which it is based." What facts were stated by this witness does not appear in the report of the case. McCay, J., said: "The precise position of Johnson, at the moment of the collision, is not positively known. He was found on the ground; he had been upon the platform very shortly before. The witnesses stated the facts, where they saw him and where he was found. It is sometimes very difficult to draw the line between what is evidence, as a fact, and what is a conclusion of the witness. Much of what we state as fact is, in truth, only the conclusion of our minds from very conclusive evidence. The statement that a man remained an hour in a room, may safely be made by one who saw him go in and come out, and who, having good opportunity, failed to see him come out in the meantime, and yet, after all, it may be, and is a mere conclusion. We think the opinion of the witness is not evidence. If the witness state the presence of the deceased on the platform, at the moment of a collision, as a fact, and it afterwards appears that this is only his conclusion, from his presence there immediately before and his position afterwards, we think his evidence ought not to be excluded. His statement of the fact is weakened, it is true, but it is often very difficult to draw the line where, in such a matter, fact ends and opinion begins."

In an action brought to recover damages for an injury caused by negligence in the construction of defendant's track and in the running of its cars, any witness may give an opinion as to what caused the train to run off the track, provided the witness states the reasons upon which the opinion is predicated. One who is an expert may give an opinion without stating his reasons. It is a general rule that wherever an expert can give an opinion without the reasons on which it is based, any other witness who knows facts upon which he can form an opinion, may state his opinion, by giving the facts upon which he bases it. Brown, J., said: "The objection to such evidence goes to its weight, and not to its admissibility. The credibility of all evidence depends, not only upon the character of the witness for truth, honesty and integrity, but also upon the

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knowledge the witness has of the facts and subject-matter about which he testifies; and this is more especially true when witnesses are allowed to give their opinions upon any subject. If it appears that the witness knows but little of the matter about which he testifies, and that from such want of knowledge, he is unable to support his opinion by good reasons, the opinion of such a witness would and ought to have but little weight with a jury; while, if he showed that he was very familiar with the subject, and supported his opinion by strong reasons, the jury would give the opinion of such a witness more weight. But in either case, it goes to the weight of the evidence, and not to its admissibility. We do not mean to say that a witness could give an opinion upon mere hearsay; he must know the facts which he states as reasons for his opinion. An expert may give an opinion upon a state of facts testified to by other witnesses." Senn, 73/705. Cited, 73/697; 77/436.

A witness may testify to the speed at which a train is moving according to his judgment, giving the reasons for his opinion; it is for the jury to say how much weight such opinion is entitled to have. Therefore, a witness may give his opinion as to speed, based on the appearance, noise, etc., of the train. Crawford, J., Wyly, 65/120.

In McEwen, 120/1003, it was held that the estimates of the witnesses as to the rate of speed varied. Some placed it at six miles an hour, which was lawful; another at more than fifteen miles an hour, which was in excess of that allowed by ordinance. There was no contradiction of the testimony that the plaintiff and two other passengers were jerked and hurled from their seats while the car was rounding a sharp curve. The physical facts were of more evidentiary value than the opinions of non-experts. Under the circumstances, estimates that the speed was not improper were insufficient to overcome the presumption arising from the fact of the injury; and the verdict for the defendant was contrary to law. Fish, P. J., and Candler, J., dissenting. Cited, 3 G. A. 773.

The admission of testimony as to experiments must largely rest in the discretion of the trial judge; and the exercise of this discretion will not be controlled, unless manifestly abused. The weight to be attached to such testimony is for the jury, and varies according to the circumstances of similarity which the jury may find to exist between the experiment made or observation taken and the

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actual occurrence whose facts and features are under investigation. The opinions of witnesses as to speed and distance are admissible in evidence; and computation of time and distance for the purpose of comparison is not objectionable, where it tends to enhance the accuracy and correctness of the opinion submitted. *Arthur*, 3 G. A. 513.

On the trial of a suit for damages on account of personal injuries sustained by the plaintiff (a little girl) by reason of having her arm caught in a machine, it was error to allow non-expert witnesses to testify that the machine "was very dangerous, and not at all safe for a child of tender years to be around." The facts should have been stated and the jury allowed to form their own opinion as to whether the machine was dangerous. *Fish*, C. J., said: "It was permissible for the non-expert witnesses to describe the machine and set forth the method of its operation, leaving to the jury to say whether or not it was dangerous. It was not for them to venture an opinion on the subject, and the evidence should have been excluded on the proper objection being made." *Evans v. Josephine Mills*, 124/318. Cited, 3 G. A. 295.

Whether or not it was proper, over objection of the defendant, to permit the plaintiff's counsel to ask a witness whether the person injured could have heard a whistle if it had been blown at any time before the engine struck him, if done with a view to showing that no such whistle was blown, because he did not seem to have observed it, it will not cause a reversal that such question was allowed to be asked, where the situation, location, and circumstances were shown, and in answer to the question the witness, a coemployee on the same job with the injured person and who had been engaged at similar work for the same company for some time, testified that had the whistle been blown opposite to a certain described post or between it and the point where the decedent was struck, the witness could have heard it at the place where he was standing, and that he did not hear it. *Pride v. State*, 133/438 (66 S. E. 259); 3 *Wigmore on Evidence*, § 1976; *Southern Railway Co. v. Bonner*, 141 Ala. 517 (37 So. 702). *Peavler*, 134/618.

Taking together the evidence of the plaintiff and his employee in regard to the entry of an order of lumber for sawing and shipment, its being sawed and checked out as it was loaded on a dray to be carried to a place on the right of way of the railway from which it was to be shipped, the inspection of it by the plaintiff at

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such place shortly before it was in part destroyed by fire, his knowledge as to the loading and unloading of much of it, and his opinion as to the quantity at the time when he last saw it on the right of way of the railroad on the day before the fire, he having been engaged in the sawmill business for several years, and in regard to his checking what remained unburned, there was no error in admitting, over the objections urged against it, the testimony of the plaintiff and his employee in reference to the size and number of pieces of lumber, using the written memoranda of the amounts as checked thereon, in connection with their testimony. Summer, 133/134.

Any witness may give his opinion, after having given the facts upon which he bases it, so as to enable the jury to determine the probative value of his opinionative evidence. The value of services rendered may be proved in this way. Walker, 5 G. A. 155.

A witness testified as follows: "If steam is shut off from an engine, the box cars run up on the engine, and the effect of shutting off steam was to make the cars run up on the engine and make a little 'slack.' There was no necessity for the jerk at the place, so far as he could see; a skilled engineer can avoid jerks to a certain extent. He has since had two years' experience in running an engine." After testifying to these facts he further stated that, "As the train passed the switch going up, the engineer was in a hurry to make a station above, and as he slacked up for the switchman to get on the train, he seemed to have shut off his engine, and the cars ran upon the engine, and he opened his engine right suddenly, I suppose." The supposition related only to the sudden opening of the engine, and amounted to nothing more than an opinion that such was the case. The testimony was properly admitted. In every instance where the subject under investigation is a proper one to be illustrated by the opinion of experts, unskilled persons may give their opinions, provided they accompany them with the facts from which they are deduced. Coggin, 73/689.

Expert evidence of blacksmiths or other workers in metal is not indispensable in order to show that the "spring-rail" of a railroad-switch, the breaking of which caused the accident, was or appeared to be sound and made of fit material. The jury may regard other evidence as sufficient to vindicate the company's diligence. It is a question on which any practical person of experience in railroading can give an opinion in connection with the facts on which the opinion is founded. Crawford, 86/5.

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A passenger by a freight-train takes the risk of the usual and ordinary jolts properly incident to handling and running such trains, and, when the nature and degree of the jolt complained of are material, a witness who was present, and had experience in such matters on the same railway, should be allowed to testify in behalf of the company that the car was not going faster than usual; that the jolt was not more than ordinary and the shake was not sufficient to throw a man, unless he was standing. This evidence would serve to communicate to the jury, in appropriate language, some idea of the nature and violence of the jolt by which the plaintiff was injured. *Mabry*, 91/781.

When it is open to question at what a horse became frightened, the witness, after stating the facts, may testify he was pretty certain the animal took fright at a particular object. *Beauchamp*, 93/6.

The question was whether the plaintiff was blameless in uncoupling a flat car from an engine while standing on the pilot, the train being in motion. The plaintiff, and other witnesses offered by him, claiming to be experts, expressed their opinions that it was perfectly safe to uncouple from the pilot, the train being in motion. The defendant then offered a witness who stated the facts of the accident as witnessed by him, and the court refused to permit him to swear to his opinion and belief whether or not what he saw plaintiff do was the act of a prudent man in taking ordinary care of himself, and to give his reasons for the opinion. The testimony was rejected because he was not an expert. That was error, and it was held that, where the opinion of an expert is admissible without giving any reason, the opinion of one not an expert is admissible with his reasons therefor. *Dorsey*, 68/228. Cited, 78/321.

In *Huggins*, 89/494, a witness who was not a physician or expert stated that he saw the plaintiff the day after the injury, and that the latter was then suffering very much from a hurt in his right side; that he sat with him two nights, and went several times for a physician; and that when plaintiff was at home and took one of his spells, which he frequently had, he always sent for this witness, who found him suffering very much. After testifying to facts of this kind, tending to show that the plaintiff was seriously disabled by the injury, it was allowable for the witness to express his opinion that the plaintiff "has been unable to perform any duties which required the slightest physical exertion, and during his severe at-

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tacks he was unable to do anything, and at best can not do anything other than jobs of a very light nature."

Where, in a suit by a car-coupler for an injury sustained by him, he testified to the injury and the manner of its occurrence, there was no error in allowing him to be asked what prevented him from making a safe coupling, and in admitting his answer that the train was coming back too fast, and that was the whole cause of it. *De-Bray*, 71/406; 77/435.

587. Injured person may not state his opinion as to permanency of his injuries.

It was held in *Walker*, 93/462, that it is not competent for a party who, as a witness, testifies to his feelings, pains, and symptoms, to state his opinion that the injuries which caused the same are permanent. *Bleckley*, C. J., said: "The view of the court below was that, as the question of permanency was one of opinion, the plaintiff, although no expert, was competent to give an opinion in connection with his reasons for it. In this, we think, the court was mistaken. Whether the injuries and their effects were permanent or temporary was certainly matter of opinion; but the jury, in so far as they were unaided by expert evidence, should have been allowed to form their own opinion, not from that of non-experts, but from the facts as proved by the witnesses. The plaintiff was competent to testify to his feelings, pain, and symptoms, as well as to all the characteristics of the injury, external and internal. This was the limit of his competency, and any opinion legitimately arising out of the facts could be more safely formed by the jury than by him. Scarcely anything is less reliable than a sick plaintiff's opinion of his own case, when he is in pursuit of damages. True, the Code declares that 'where the question under examination and to be decided by the jury is one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor.' The class of questions here referred to must be such as lie within the range of common opinion, although they may be somewhat within the province of scientific opinion, also. A fair illustration would be the question of sanity or insanity. Any witness may give his opinion upon such questions, after stating the facts on which it is founded. But suppose the question were whether, in a given case, insanity was permanent or temporary. This would be a question for scientific experts; and no court would think of taking the opinion of an ordinary witness upon it, with or

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without the facts on which the opinion was founded. Such a witness would be competent, upon stating the facts, to testify to his belief of the sickness or health of any one, or that he suffered pain. But this is a very different matter from taking his opinion upon the question of when and how sickness would terminate, or whether a state of pain would be temporary or permanent. Non-expert opinion might be relied on to take the step from observed facts to a present state or condition, but to pass upon these same facts, the present state and condition included, to a probable future state and condition, might be within the competency of expert opinion only. We think this is so, in such a case as the present more especially, where a part of the facts are not objective, but wholly subjective, consisting of the feelings and sensations of the witness himself, and being accessible to no other witness. How could such testimony be answered? How could the opinion of this non-expert be met by a conflicting opinion of another witness of his own class? No other witness could possibly know what his sufferings are or have been, so as to make them a basis of belief or non-belief as to their permanent character, or as to whether they would be only temporary. The Code surely does not intend that internal facts—facts of mere individual consciousness—shall be used as a basis of the opinion which it contemplates as being admissible in evidence, where the question is one of opinion. Both for this reason, and because the question on which the witness in this case was permitted to give his opinion was a scientific question, we think the evidence should have been excluded.” Cited, 110/128; 118/142; 122/96; 123/780; 129/846; 7 G. A. 659. To the same effect, *Stancel*, 118/142.

In *Clariday*, 124/958, *Cobb*, P. J., said: “The petition alleged that the plaintiff had been permanently injured. The evidence in support of these allegations consisted of the plaintiff’s testimony detailing the injuries he had received, the extent to which he still suffered from them, his earnings previous to, and his ability to labor after, the injury. Other witnesses testified to his inability to work since his injury. Would such evidence warrant a charge on the subject of permanent injuries? Permanent injuries may be proved either by the opinions of physicians or by proof of facts from which a jury would be authorized to infer that the injuries were permanent. Expert opinion is not a requisite to establishing this kind of injury. When a plaintiff has proved the loss of a limb, no further evidence

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is necessary to show the permanent nature of the injury. The inference of permanency may arise from proof of physical injuries which do not involve the total destruction of parts of the body. When bodily hurts are proved, and the effect of them upon the person injured both as to the pain he has suffered and his inability to labor by reason of them, especially when these consequences have continued for two years, and the person injured has reached the advanced age of sixty-seven or sixty-eight years, we think a jury would be authorized in finding that the injuries were permanent. Such was the evidence in the present case. It is true that the plaintiff did not himself testify that his injuries were permanent. His opinion on that subject would have had no value. The facts upon which he would have based any such opinion were before the jury, and the jury were as competent as he could have been in determining this question. It was said by this court in *Barnes*, 113/212: "The jury saw Barnes and heard his recital of his injuries and his condition at the trial. They may have preferred to follow their own judgment as to his chances of complete recovery than to accept as absolutely reliable the theory of medical experts who expressed the opinion that he would ultimately regain his former strength and vigor, but according to whom this most desirable condition might be postponed for years." See also *Walker*, 93/462; *Streyer*, 123/279. We think the question of the permanency of the injuries to the plaintiff was properly submitted to the jury." Cited, 125/368.

588. Opinion of the plaintiff as to his damages.

In *Kelley*, 58/107, on the trial the plaintiff was allowed to swear that the damage to him from the crushing of his hand caused by the coupling of the cars was ten thousand dollars. He stated how he was hurt, but he did not itemize, even in opinion, the several items which, in his opinion, made up the ten thousand dollars. This testimony should not have been admitted. Where the issue is one of opinion, as sanity or insanity, or handwriting, or the value of an animal, or such matters as are matters of opinion only, and can be better elucidated in that way, these experts may give opinions without reasons, and anybody familiar with the facts may give his opinion with his reasons. The damage is to be fixed by the jury, according to their opinion derived from facts testified to, such as loss of the use of such a member of the body as the right

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hand, the diminution of ability in a laboring man to make a living after such loss, the pain and suffering caused by the wound, the bill of the physician and the expense of nursing, and all other facts and circumstances connected with the case; and this opinion of the jury should be influenced by the opinion of no witness, given in round numbers, of the amount of the damage, but made up from facts, when capable of proof, of actual damage, and of the enlightened, conscientious belief of impartial jurors in respect to items incapable of exact proof, such as the feelings, the pain and suffering, of the plaintiff, etc. Cited, 72/287; 77/435.

589. Plaintiff's opinion of her loss by inability to labor.

So in *Senn*, 73/705, it was held that the plaintiff, as a witness, should not be allowed to state how much, in her opinion, was her loss by her inability to labor. The witness can not give an opinion as to the amount of the damages, but must state facts, and let the jury say from the facts what is the amount of the damage. Cited, 73/697; 77/436.

590. Opinion without stating the facts.

A witness who is not an expert as to the subject upon which he is questioned is incompetent to give an opinion thereon without stating the facts upon which his opinion is based. *Bagwell*, 107/157.

It was not admissible for a witness, who was not shown to be an expert, to testify, over the objection of counsel, that the deceased was doing the work he was required to do at the time of his death in a proper or an improper manner; such testimony being an expression of an opinion, and not a statement of a fact. *Brush Electric Light & Power Co. v. Wells*, 103/512.

The action, *Gilmer v. City of Atlanta*, 77/688, was brought to recover damages for an injury caused by the roots of a tree which projected above a sidewalk and in which plaintiff's foot caught causing her to trip and fall. After a witness had stated the condition of the roots, he added: "One could very easily trip on them on a very dark night." The opinion was properly rejected.

A question to a witness in this form, "If the engineer had paid any attention to the signals that were given, and stopped the train, would this man have been killed?" was objectionable, as calling for his opinion, when the facts on which his opinion was based were

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the proper objects of inquiry, the conclusion from such facts being a question for the jury and not for the witness. *Kendrick*, 89/782.

The opinion of a witness that the backing of the train was very carefully done, and that nothing was done carelessly or negligently, was not admissible. *Ryles*, 84/420.

Negligence of the railway company in allowing the surface of the track to be uneven, so as to endanger walking thereon by employees in the discharge of their duties, being in question, the opinion of a witness as to the comparison of this track with those of others in the State generally is not admissible. *Chaffin*, 84/519. Cited, 86/299.

591. Opinion as to how far a train would knock a man, and as to stopping a car.

In *Bond*, 111/13, it was held that the rule that where the question under examination is one of opinion, a witness not an expert is incompetent to testify to his opinion without stating the facts on which it is based, applies when an attempt is made to prove what distance a train running at a given rate of speed would "knock" a man struck by it on the track. *Lumpkin*, P. J., said: "When the witness expresses his opinion in connection with the facts which he regards as justifying it, the jury are to judge of the value of it, and this they can not do in the absence of such facts. This familiar rule is applicable in the present instance. No witness could say, as matter of fact, that a running train would, by the impetus of a collision with a man on the track, carry him so many feet. What would happen under such circumstances is certainly, so far as relates to the question of distance, purely a matter of opinion." This case again, 114/913.

It is competent to show, by a witness proved to have been familiar with the operation of electric cars, the usual means of stopping such a car under given circumstances, regardless of the means of loading the car, the grade upon which it is running, or the speed at which it is run. It is also competent, in such a case, to prove by expert testimony within what distance a single car can be stopped on a given grade, though it appear that the train which caused the plaintiff's injuries was made up of three cars, and that the grade at the place where the injuries were received was not so steep as the one in the hypothetical question submitted to the witness. It is also admissible, in such a case, to

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show the general effect of curves upon the speed of a car, and this may be done by a witness who is an expert in the running of steam, but not of electric railroads. Monk, 118/449.

592. Opinion as to matter of fact.

In DeBray, 71/406, a witness testified that the lantern plaintiff used was furnished him that he might see how to perform his duties with safety to himself; that he knew the character of the lantern. Defendant then offered to prove by the same witness that a person in getting off a train could, by the light of the lantern, readily see any object near the track; which proof the court rejected. On exception, the ruling was held to be correct, as the opinion of a witness as to matters of fact is not admissible in evidence. Cited, 77/435; 125/88.

If the question as to who was the general manager of a manufacturing company, which operated a mill, was material, it was not competent to show, by the testimony of a witness who was the superintendent of such mill, that he supposed that a named person acted as the general manager. *Holland v. McRae Oil & Fertilizer Co.*, 134/678.

Where the plaintiff contended that a certain appliance of the defendant had been left in a dangerous condition by the superintendent of its mill, and this was denied by the defendant, it was not competent to have such superintendent, as a witness, give in general terms his opinion as to whether he had left such appliance in a dangerous condition or not. The facts should be proved for the consideration of the jury. *Holland v. McRae Oil & Fertilizer Co.*, 134/678.

It was not permissible for a witness in behalf of the plaintiff to state his "conclusion," drawn from facts testified to by him, that at the place where her husband attempted to cross the company's track there was less danger to a pedestrian than there was at a near-by crossing. Nor was it the right of the defendant to introduce evidence tending to show general knowledge on the part of the public as to the danger incident to crossing its track at the point where the plaintiff's husband was killed. Evans, 121/391.

593. Declarations as part of *res gestæ*.

In Mitchum's case, 11/615, it was held that declarations to be a part of the *res gestæ* must be contemporaneous fact, but to be con-

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temporaneous they are not required to be precisely concurrent in point of time. If the declarations spring out of the transaction—if they elucidate it—if they are voluntary and spontaneous, and if they were made at a time so near to it as to preclude reasonably the idea of deliberate design, then they are to be regarded as contemporaneous. And in the opinion, Nisbet, J., said: “In determining questions about the *res gestæ*, it is error to undertake to test them by a definition or rule. For what is the *res gestæ* of a given transaction must depend upon its own peculiarities of character and circumstances.” This opinion received handsome recognition in 85/775.

Section 5766 (5179) of the Code expresses the rule in this way: “Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of *res gestæ*.”

In *Ins. Co. v. Sheppard*, 85/775, Bleckley, C. J., said: “What the law altogether distrusts is not afterspeech, but afterthought.”

Whether statements claimed to be a part of the *res gestæ* are really such is a question of law to be determined by the court. Even if the question whether statements are a part of the *res gestæ* can in any case ever become a mixed question of law and fact to be submitted to the jury, the statements in the present case were not of a character to require their submission to the jury. *Brown*, 126/1.

It is incumbent on a party seeking to introduce hearsay evidence, as part of the *res gestæ*, to prove that the declarations testified to were so nearly connected with the transaction under investigation, in point of time, as to be free from any suspicion of device or afterthought. The word “immediately” is a relative expression; and it is not sufficient, in order to render declarations admissible as part of the *res gestæ*, to show that they were made “immediately” after the transaction, without showing, at least approximately, how nearly they were connected therewith in point of time. *Pool v. Warren County*, 123/205.

DECLARATIONS ADMISSIBLE AS PART OF THE *RES GESTÆ* OF THE MAIN
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594. By a trespasser.

In *Gilliam v. Love*, 30/864, the action was for beating the plaintiff and tearing down his house, and evidence that the defendant

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declared, while committing the trespass, that he was doing it because the plaintiff traded with his negroes was proper evidence to go in mitigation of damages.

595. By a person injured.

In *Beason*, 112/553, it was held that the trial court erred in admitting, as a part of the *res gestæ* of the casualty under investigation, a narrative given by the plaintiff's deceased husband touching the manner in which he was injured. *Lumpkin*, P. J., said: "What the injured man said to the witnesses was manifestly a mere narrative of a past occurrence. His statements, notwithstanding the fact that he was suffering great pain, were made deliberately and connectedly. They were in no sense exclamatory, and manifestly did not proceed from him as part and parcel of the catastrophe. It is true, these statements were made within a few minutes thereafter; but, in determining whether declarations should be received as a part of the *res gestæ* of an occurrence, the mere question of the lapse of time is not controlling. The real test is, were the declarations a part of the occurrence to which they relate, or were they a mere narrative concerning something which had fully taken place, and had, therefore, become a thing of the past." Cited, 123/358.

A young girl received a terrible and painful injury while employed in a factory, and subsequently died from it; about half an hour after the injury, upon the return of her father to his home on receiving information of the accident, she stated to him that they put her to work on some new frames; that she refused to go, and the second hand cursed her and told her to go to work; that this frame was different from the old frame, and she did not want to run it; that they had to "duff" and stop the machinery to clean it off, and that the agent who directed the work at this frame started it without giving the usual signal. It was shown that she was injured while cleaning machinery, and that the person named as starting the machinery directed the work of the operations at that particular frame and gave the signal prior to starting: It was held that the statement was admissible as a part of the *res gestæ*. The propriety of its rejection would have been, to say the least, doubtful, and in cases where the competency of evidence is doubtful, it should go to the jury, that they may consider how far its force is impaired by surrounding incidents. The death of the person making the statements which form a part of the *res gestæ* is no ground for

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their exclusion from evidence. Hall, J., said: "It is scarcely credible that this little girl, while enduring such excruciating pain—perhaps torture would not be too strong a word to characterize it—from this frightful wound, would have been capable of framing a story with a view to her ultimate advantage or gain, or for any other ulterior purpose." *The Augusta Factory v. Barnes*, 72/217. Cited, 73/629; 75/640; 79/311; 82/268; 93/787.

In *Ferguson*, 75/637, it was held, that where a child of ten years of age was seriously injured at a turntable belonging to a railroad, and a witness who reached the spot a few minutes after the injury occurred, and who testified to circumstances tending to show that the turntable was the instrument by which the child was hurt, such as the appearance of fresh, warm blood, and pieces of flesh torn from her limbs being on the machine and in the pit under it and on the end of the rails, it was error to refuse to allow such witness to testify what the child said when he reached the place as to how she was hurt. Such statements were part of the *res gestæ*. Nor did it matter as to their admission whether the child lived or died. Hall, J., said: "In *Augusta Factory v. Barnes*, *supra*, we recently examined this question with care, and came to the conclusion that declarations made a half-hour afterwards by a child similarly injured, and who died from the effects of the injury, were so near in point of time thereto as to exclude all suspicion of device or afterthought, and were admissible as part of the *res gestæ*. We are well satisfied with the conclusion reached in that case, and can not conceive that the death of the party makes a difference in the application of the rule. The testimony is original, and the declaration is not a mere declaration, but being contemporaneous, or nearly so, with the act, becomes a part thereof, and is a distinct though not altogether an independent fact." Cited, 93/787.

In *Randall*, 79/304, it was held that where, in a suit against a street-railroad company for a personal injury, the plaintiff testified that, after she was thrown from the car to the ground and immediately after she had risen, picked up her bundles and brushed herself, the first thing she did was to secure the name of the driver of the car (whom she knew very well by sight only) and that she then went to her house, which was about one hundred and fifty or two hundred yards away, deposited her bundles and went across the street to where her sister-in-law lived; and where the sister-in-law testified that, when the plaintiff reached her house

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she was greatly excited, and in reply to an inquiry as to what was the matter, made certain statements as to how she was hurt, whereupon the witness gave her some brandy and tea and put her to bed; it was not admissible for the sister-in-law to testify what statements the plaintiff made to her, or that they were the same as what she testified on the trial. Such statements formed no part of the *res gestæ*. They neither accompanied the main transaction nor were free from all suspicion of afterthought. Blandford, J., said: "Upon recovering herself, after this occurrence, the first thing she did was to inquire the driver's name. What was her purpose in inquiring the name of this driver, whom she knew well by sight, and with whom she was personally acquainted, having ridden with him frequently on the car? Is that free from all suspicion that she had an ulterior purpose or design in making this inquiry? Does it not give rise to the suspicion that she was fixing for a case against this railroad company? This was done after the act was over. She then went to her own house, one hundred and fifty or two hundred yards off, and put away her bundles; then crossed the street, and went to her sister-in-law's house, and while there entered into the details of how this thing occurred. We are of the opinion that the court did wrong to admit this as a part of the *res gestæ*. It is not connected with the transaction so closely in point of time as to be free from all suspicion of device or afterthought. The suspicion might arise in the mind of any man that here was device or afterthought. She inquired that driver's name for the purpose. She had had time to look over the field. She seemed to have known her rights and to be preparing for them. Having done this, she went and made this relation to her sister-in-law, stated her testimony about her having rung the bell, and the car having stopped, her attempt to depart from the car, and the starting of the car without affording her a reasonable opportunity to get off—the vital facts upon which the whole case turns. These declarations were not exclamatory upon her part upon receiving this injury; and we can not help coming to the conclusion in our own minds that here was artifice or afterthought, or at least that it is not free from all suspicion. The case of *Factory v. Barnes*, *supra*, was much relied on by the counsel for the defendants in error in this case. That case must rest alone upon its own peculiar facts, and will not be extended beyond them; but it differs widely from this case in all respects except in point of time in

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which the declarations were made. The proximity of time in which declarations were made to the main transaction is not the only test of their admissibility in evidence, but they must be also free from all suspicion of device or afterthought." Cited, 82/268; 92/338; 112/557.

In *Holland*, 82/257, the plaintiff, a passenger upon a railway, who left the train late at night, and in so doing was injured by a fall which broke his leg, having pulled off his coat, detached his suspenders, bound up his broken limb, crawled through a culvert from one side of the railway to the other, seated himself on the cross-ties, and cried for help, his account of the manner of his leaving the train and receiving the injury, given to a person who reached him about half an hour after first hearing his cries, was no part of the *res gestæ*, and, being mere narrative of a past event, was not admissible evidence in his own behalf. Bleckley, C. J., said: "It is manifest that the act by which the plaintiff was injured had completely terminated before his declarations were made, and that they were no accompaniment of the same. Were they so connected with it in time as to be free from all suspicion of device or afterthought? He had turned his attention from the act to measures looking to his own safety and comfort. He had certainly occupied his thoughts with something besides the facts and circumstances to which his declarations related. He had full opportunity, although no doubt under great suffering, to devise a story in his own interest; and there is no reason for concluding that he did not have capacity to take advantage of his opportunity. He was exposed to the temptation of fabricating a story, if he needed the aid of invention; and the exposure was under circumstances calculated to excite suspicion that his statement was, or might have been, referable to deliberation and afterthought, rather than to spontaneous or instinctive utterance. This does not imply that he did fabricate, for he might not have done so. Truth may have been with him, and invention unnecessary. But, as his declarations did not accompany the act, they had to be so nearly connected therewith in time as to be free from all suspicion of device or afterthought. If subject to suspicion at all, they were not admissible, although, in the particular case, the suspicion might be erroneous. In *Factory v. Barnes*, *supra*, the injured person was a child fourteen years old, and she died from the injury. Her declarations, made half an hour after the injury was received, were ad-

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mitted in evidence upon the ground that they were free from suspicion; this court saying: 'It is scarcely credible that this little girl, while enduring such excruciating pain—perhaps torture would not be too strong a word to characterize it—from this frightful wound, would have been capable of framing a story with a view to her ultimate advantage or gain, or for any other ulterior purpose.' In considering that case afterwards in Randall, *supra*, in which latter case the declarations of a mature woman, not more remote in time, were held inadmissible, the court said: 'That case must rest alone upon its own peculiar facts, and will not be extended beyond them. * * * The proximity of time in which declarations are made to the main transaction is not the only test of their admissibility in evidence, but they must also be free from all suspicion of device or afterthought.' It is obvious that, upon this requisite of freedom from suspicion, the age and discretion of the speaker must be of very considerable importance." Cited, 83/88; 92/338; 112/557.

In a suit by a widow against a railroad company for the homicide of her husband, wherein she alleged that his death was caused by the negligence of the company in failing to repair a private crossing over its track, declarations of the husband, made to his wife and others, after he had ridden half a mile from the crossing, to the effect that he was riding a mule over the crossing, and that the mule had fallen because of a hole therein, and had thus injured him, were inadmissible, not being a part of the *res gestæ*. Poole, 92/337; 112/557.

In Roach, 93/785, it was held that declarations made twenty minutes after a collision between a locomotive and a buggy, by one who was in the buggy, and who was injured by the collision, and who had been removed a considerable distance from the scene of the collision to a house in which he was being cared for, are not admissible as a part of the *res gestæ* of the collision, the declarations being in the nature of a narrative of what had occurred, including statements as to the cause of the collision, and not spontaneous exclamations made on the spot, or very near thereto, and not in point of time so immediately after the occurrence as to be properly regarded as a part of the occurrence itself. Cited, 101/802; 112/557.

In Newsom, 66/57, it was held that what the plaintiff said a short time—some six or seven minutes—after the injury was done, at a

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place some four or five hundred yards distant, to which he went, as to the malice of defendant's agent in blowing the whistle, was not admissible in his own behalf as part of the *res gestæ*. Nor was what defendant's engineer said some time after the injury and at a different place some miles away, indicating the state of his feelings toward the person injured. Cited, 92/338; 107/371; 123/358.

Maloy, 77/237, was an action brought for the homicide of the plaintiff's minor son, and it was held that testimony that the son, prior to his death, made a certain statement as to how the injury was done, was inadmissible, it not having been made at or near the time of the accident so as to be admissible as part of the *res gestæ*. Dying declarations are not admissible in civil cases.

Where the plaintiff claimed that he was injured by a fall in attempting to alight from a railway train while in motion, under the direction of the conductor, there was no error in allowing a witness who had testified that as the plaintiff attempted to leave the train he pitched forward, fell, and rolled over on the ground, to state, "I don't remember plaintiff saying anything as he rose, except that he was hurt on his shoulder and leg and hip," there being nothing to indicate that this was an afterthought or was a mere narration of a past transaction. Brown, 126/1, 5 (2). Especially will this furnish no ground for reversal, where the presiding judge in a note to this ground of the motion for a new trial certified that the witness had already testified, without objection, that immediately after he got up he had stated that he was hurt, and that his shoulder was hurt. Haralson, 133/231.

Where a young woman nineteen or twenty years of age claimed to have been injured by the sudden jerking of an electric car of a street and suburban railway while she was in the act of alighting, throwing her against the side of the car, and she testified that after this she walked into the station and sat down for a few minutes, and then walked to her destination, which was a house two or three hundred yards distant; and where the evidence showed that upon arriving there she was observed to look pale and to be trembling, and was asked what was the matter, and made a statement as to the manner in which she claimed to have been injured, such statement constituted no part of the *res gestæ* and was properly excluded. McBride, 125/515. Cited, 129/846.

A narrative as to the circumstances under which a person was injured in alighting from a moving train, given by him a half hour

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or more after he was hurt, to persons arriving on the scene, is not admissible as a part of the *res gestæ* of the occurrence. Nor can a statement as to what occurred, made by him on the following day to an agent of the defendant, who reduced the statement to writing, be regarded as competent evidence. *White*, 123/353.

On the trial of a damage suit for personal injuries, testimony by the defendant's witness to the effect that, after ample opportunity, the plaintiff did not tell the witness that he was injured, or to the effect that the witness had not heard that the plaintiff was injured, is not inconsistent with and can not be impeached by testimony of the plaintiff's witness to the effect that on some occasion, not shown to be identical with that referred to by defendant's witness, the plaintiff did declare to such witness the fact that he had been injured. Declarations of the latter kind, not shown to have been made under such circumstances as to form a part of the *res gestæ*, nor in the presence of the defendant, are inadmissible as evidence at the instance of the plaintiff. When admitted over appropriate objection, if the conflict of evidence is sharp on the issue as to whether the plaintiff was in fact injured, the error of admitting such evidence will require the grant of a new trial, on motion of the defendant. *Varner*, 129/844.

596. By a spectator.

In *Davis*, 27/113, it is said that declarations of a person who is not a party, nor the agent of a party to a transaction, and who is a competent witness, not made at the time of the act of which it is insisted it is explanatory, are not admissible in evidence as part of the *res gestæ*. These statements were made by *Mrs. Winn*, who was injured by the collision, but who was not a party to this action. Cited, 28/95.

In *Bagwell*, 107/157, the plaintiff was a passenger on a street-car. A collision occurred and she jumped from the car and was injured. The trial judge permitted her to testify that just prior to the collision, "People on the street were screaming for the motor-man to stop." It was held that, "the cries and exclamations of bystanders upon seeing an accident about to occur may be proved to explain the state of mind and conduct of a person hearing them and who is injured in the accident."

After a railroad collision, the passengers signed and issued a card exonerating the agents of the company. The headnote states that

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it was immediately after the collision. The report of the case states that it was made and signed on the spot, just after the catastrophe, but how long did not appear; the bill of exceptions says it was fifteen or twenty minutes afterwards, and McCay, J., says it was the next day and after much dispute and crimination, and against the first impressions of the passengers. It was not evidence as part of the *res gestæ*. Johnston, 38/410.

597. By a party to a fight.

Sayings uttered after a fight, on the same day, but how long afterwards does not appear, on the opposite side of a public square two or three hundred yards from the place of the fight, were not part of the *res gestæ*. Cherry v. McCall, 23/193.

598. Complaints as part of the *res gestæ* of pain.

In Smith, 76/209, a witness was allowed to state of the plaintiff: "Indeed, he threatened that if he did not get better, he would take his life; he contemplated suicide." The statement was made months after the accident in which he was injured, and it would seem, from the opinion in the case, that it was made to a physician with whom he was consulting at the time, and whose treatment he was endeavoring to avail himself of. It was held to be doubtful whether the testimony was admissible, but that where the admissibility of evidence is doubtful, the rule in this State is to admit it. Hall, J., said: "The general rule, as laid down by writers on evidence, is that 'the representations by a sick person of the nature, symptoms and effects of the malady under which he is laboring at the time, are received as original evidence. If made to a medical attendant, they are of greater weight as evidence; but, made to any other person, they are not on that account to be rejected.' 1 Gr. Ev. § 102. But this rule, particularly its latter branch, is to be very carefully guarded and restricted in its application, especially where it is apparent that the declarations constitute no part of the *res gestæ*, and may have been made for the purpose of promoting some ulterior scheme, as for the purpose of being used in evidence in a contemplated or pending lawsuit brought to recover damages for the injury from which the party insists he is suffering."

Where one receives a personal injury, which causes at first temporary unconsciousness, and a physician is called, and during his attendance, extending continuously through some weeks, the patient

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complains of pain, and indicates the region thereof in her system, these facts are competent evidence in her favor on the trial of an action for the tort causing the injury, when testified to by the physician, in connection with a description of the symptoms which he observes in the course of his attendance and treatment. Smith, 94/580.

In *Prisock*, 97/643, it was held that exclamations or complaints made by a person undergoing physical examination by a physician, with a view to ascertaining the extent of his alleged injuries, and apparently made in response to manipulations of the person's body or members by the physician, are admissible in evidence, though such person was not under the treatment of this particular physician, and the examination was being made solely for the purpose indicated. Whether or not the exclamations were involuntary, or the complaints were bona fide, is for determination by the jury, under all the evidence submitted. *Simmons*, C. J., said: "Such complaints are regarded as manifestations of pain, as a part of the *res gestæ* of the pain, and are not classed with mere descriptive statements. They are received as original evidence, and may be testified to by any person in whose presence they are uttered. In *Walker's* case, *infra*, it did not appear that the complaints were of this character."

Since the change in the law allowing parties to testify in their own behalf, it is not competent for a plaintiff suing for physical injuries to prove by his wife that subsequently to their infliction he frequently complained to her of pains and hurts resulting therefrom, and stated that he suffered a great deal. *Bleckley*, C. J., said: "The plaintiff's wife was permitted to testify to his complaints made in her hearing. She said he complained of his side a great deal, and, being told to state all of his complaints, she said his head hurt him, and his side and his leg; he suffered a great deal. Such evidence as this, by a witness other than the wife of a party, was competent and admissible, so long as the law excluded parties from being witnesses in their own behalf; but now that they are, by statute, competent to testify, and where, as in this case, the testimony is heard from the plaintiff himself, who knew the facts of pain and suffering, his wife, whose knowledge of them was derived from hearsay, was not competent to prove complaints which were no part of the *res gestæ* of the injury. The ground on which such evidence was formerly deemed competent was the ground of

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necessity. That necessity no longer exists. The higher and better evidence is that of the person who has actual knowledge of the truth of the pains and other feelings to which the complaints relate. This view is taken by the Court of Appeals of New York in the case of *Roche v. Railroad Co.*, 105 N. Y. 294, 11 N. E. 630. The reasoning of that case is entirely satisfactory, and applies as forcibly in Georgia as it does in New York. Indeed, before parties were made competent witnesses, the wife of the plaintiff could not be heard to testify at all in favor of her husband. The same statute which rendered her competent to testify for him, rendered him competent to testify for himself." Walker, 93/462. Cited, 97/647; 99/255; 101/18.

A husband was allowed to testify as follows: "I don't know the cause of it, but she has suffered a great deal from her hip. I saw its swollen condition and frequently rubbed and bathed it for her." It was held that while a husband is not competent to testify as to oral complaints made to him by his wife concerning her "pains and hurts" resulting from a physical injury, Walker, *supra*, he may testify as to the physical condition of any of her members of which he had actual knowledge; and, if such condition manifestly caused suffering, he may so state. Wainwright, 99/255. Cited, 122/97.

The wife of the injured party is not, because of the marital relation existing between them, and the policy of the law to preserve inviolate confidential communications between husband and wife, incompetent to testify as to the nature of the injury received by him and its effect upon his physical condition, when there is nothing to indicate that her knowledge on the subject was gained because of any confidence which he reposed in her as his wife. The wife may testify to symptoms which she observed, indicating that her husband suffered from headache, but should not be permitted to generalize or state any bare conclusion based upon her observation of others who had headache, she not professing to be an expert. Mason, 123/773.

After showing the injury, there was no error in permitting the physician who treated the injured person to testify, "In dressing his shoulder you couldn't dress the shoulder without your moving the arm, and when you would move the arm he would complain of pain. That is about the only way I could tell it." Gilleland, 133/621.

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While in the trial of an action for personal injuries evidence that the plaintiff complained of specified pains and injuries is not ordinarily admissible, it will not, in a given case, be cause for a new trial that evidence was admitted that the plaintiff merely complained, and stated that she had received a jolt in alighting from the train. *Burnham*, 123/28.

On the trial of such an action, complaints made by the plaintiff to her attending physician of pains in designated portions of her body were not admissible in evidence in her favor, unless made under such circumstances as to be equivalent to spontaneous and involuntary exclamations or out-cries, groans, convulsive movements, and other physical manifestations of present pain and suffering. *Gardner*, 122/82. Cited, 123/31; 2 G. A. 588.

The declaration of the plaintiff, made to a physician, that he felt no sensation of pain resulting from sticking a needle into his finger, does not fall within any of the exceptions to the rule as to hearsay, and was properly excluded. *Walker*, 93/463, 21 S. E. 48; *Broyles v. Prisock*, 97/643, 25 S. E. 389; *Gardner*, 122/82, 49 S. E. 818. Especially was there no error in excluding declarations of the plaintiff, as to his physical symptoms and suffering, which were no part of the *res gestæ* of the injury, when the plaintiff himself as a witness fully described the character and extent of his injuries. "The higher and better evidence is that of the person who has actual knowledge of the truth of the pains and other feelings to which the complaint relates." *Walker*, 93/467; *Goodwyn*, 2 G. A. 470.

Where on the trial of an action for a personal injury the plaintiff, while on the stand as a witness, admitted that he had not made complaint in reference to the injury to any one save his wife until some days after he was injured, and other testimony was also admitted to show that he had made no complaint on the night of the injury, exclusion of the testimony of still another witness tending to show that he heard no complaint will not, even if admissible on account of the opportunity of such witness to have heard such complaint if made, require the grant of a new trial, after verdict in favor of the plaintiff. *Woodruff*, 135/24.

599. Statements by conductor, engineer and other employees.

Plaintiffs offered to prove the sayings and declarations of the

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conductor and engineer which were made at a station about a mile below where the accident occurred, after the train arrived there and while stopping there. It had previously stopped a short time immediately after the accident occurred. They were not admissible as a part of the *res gestæ*, as they were uttered at an indefinite time after the happening of the thing to which they related. And they were made when the conductor and engineer were not acting as the agents of the company. Sims, 28/93.

Sayings of a conductor to a fireman made at the next station and ten miles from where the accident occurred, were offered by the company in evidence. The conductor was dead when the case was tried. The sayings were inadmissible, especially for the company. They were inadmissible even against the company, unless part of the *res gestæ*. Kelley, 58/107.

On the trial of Weinkle, 107/367, the court allowed a witness to state: "As I came up, the engineer sang out to me, 'Hello, Cap, it looks like we have killed some of your mules,' and I said, 'They are not my mules,' and he then turned to the fireman and said, 'We have sure played hell to-night;'" the objection to this testimony being that the engineer was not clothed with authority to bind the company; and that the evidence was illegal and inadmissible, being no part of the *res gestæ*, as it appeared that the witness was at his house some distance away when the mules were killed, and that he walked from his house to the train before having the conversation above quoted. Cobb, J., said: "Unless the declarations of the engineer were made while he was engaged in the transaction of some business of the company with the person with whom he was talking within the scope of his authority, or were declarations accompanying an act done by him in discharge of some duty imposed upon him in his relation as a servant of the company, the evidence was inadmissible and should have been rejected. It is not pretended that the statements made by the engineer were made in the course of any transaction with the witness in relation to the company's business, and therefore such statements do not come within the reason of that rule which permits the declarations of an agent to be introduced against his principal when they are made *dum fervet opus*. Were the statements of the engineer a part of the *res gestæ* of the occurrence so as to make them admissible for that reason? It does not distinctly appear in the record what was the lapse of time between the killing of the mules and the conversation between the engineer and the witness; but from what does appear it must

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have been such a lapse of time as that the declarations were not, in any sense, contemporaneous with the act of killing the mules. The witness was not present at the time that the collision occurred, and it is to be inferred from what is stated in the motion for a new trial that when the witness arrived upon the scene such time had elapsed that the engineer was in a position to fully realize the consequences resulting to the company from the killing of the mules, and that therefore the occurrence which was the subject of the conversation was in the past." Cited, 112/557.

In Newton, 85/517, the court admitted in evidence certain statements made after the homicide, by a person alleged to have been the engineer on the train. This testimony was objected to on the ground that it was not shown that the person making the statement was an employee of the defendant, so that his sayings in and about the occurrence were competent evidence to bind it. The court submitted the question to the jury, for them to find whether the person who made the statement was the engineer or not. Simmons, J., said: "We do not think there was an error in admitting this testimony over the objection that was made to it at the time of the trial. If it was a doubtful question whether the person who made the statement was the engineer of the defendant, or of some other person, the court was right in submitting that question to the jury. If the objection had been that the statement of the engineer, made after the transaction had ended, was inadmissible, it would present a different question."

A statement made after the injury by another employee of the company, who was superior to plaintiff, to the effect that it was plaintiff's duty to examine the cars as he was doing when he was injured, is inadmissible as hearsay. He could not bind the company by anything he could say which was not a part of the *res gestæ*. Howard, 84/711.

A statement made shortly after an accident, by the conductor of the train, to the witness, of what he heard the engineer state about the cause of the accident, was mere hearsay testimony, and was inadmissible. Maloy, 77/237.

600. Declarations of agents.

In Wright, 34/330, it was proven that the afternoon of the accident the brakeman said that the axle of the car was too short and that he had told them so. The court said: "This saying should

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not have gone to the jury until it had been shown that it was within his peculiar province to watch over and superintend the condition of the cars constituting the train and having such a control as to direct which should go and which not. Beyond the scope of his agency, an agent can not by his declarations, affect his principal. And as corporate bodies, especially railroad companies, have daily hundreds of employees, in various services, with divisions of labor and duty, simple justice requires that these companies shall not be liable for damages upon the loose or casual sayings of every person who may be in their employment." Cited, 56/276; 77/213; 85/489.

On the trial of a suit against a railroad company for damages to the plaintiff, an employee of the company, caused by the negligence of his coemployees, it was error to permit the plaintiff to testify that an assistant superior had told him, after the injury was done, that the company felt itself under obligations to support him and his family during life. At best, it was the mere admission of an agent not in the actual execution of his duty. Duggan, 51/212.

In Blitch, 76/333, the plaintiff was not allowed to prove that the defendant's master of trains had agreed to pay all expenses incurred by him on account of his injuries and illness. This agent had no power to bind the company by such a promise, and it was not an admission made by an agent *dum fervet opus*.

That an engine was defective is not established by the testimony of the plaintiff that the engineer told him some days after the injury that it had certain defects, although the engineer had testified that he did not so tell him. Impeaching the evidence of the engineer by contradicting him as to what he had said would not prove that what he had said was true. Not being a part of the *res gestæ* they were clearly inadmissible as declarations or admissions against the railroad company. Such impeaching evidence being the only evidence touching any defect in the engine, there was nothing on which to base instructions to the jury to "look to the evidence, and determine whether the engine was defective, * * * whether there was a leak in the steam, which escaped into the cylinders, and caused the accident." So instructing was consequently erroneous. Maltsby, 90/630. Cited, 95/463; 125/87.

Where a railroad company is sued for personal injuries, declarations made by an employee after the time of the injury, and not as a part of the *res gestæ*, are inadmissible for or against the

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company; but such declarations may be proved by another witness to contradict or impeach the testimony of the employee on the trial of the case. The impeaching evidence can not be used to establish the statements in the declarations of the employee, but is admissible for the sole purpose of impeachment by proof of contradictory statements. *Peddy*, 120/589.

The declarations or admissions of an agent, unless part of the *res gestæ*, do not bind the principal, and in a suit against the principal have no probative value. Conduct of an agent, from which it is sought to imply an admission, is within this rule. *Harris*, 1 G. A. 714.

601. Statements by president of construction company.

In *Liddell*, 85/482, it was held that sayings of the president of the construction company which was building and equipping the railroad, made two or three hours after the accident occurred, at another place, to a newspaper reporter, that it would be to his interest not to publish too much, that the railroad at the place of the accident had been laid only temporarily, that he had not had time to put the broad-gauge ties on it, and did not want public opinion so strong against him, etc., were not admissible. *Simmons, J.*, said: "Williamson was the president of the construction company which was building and equipping the road. While it is true that the construction company was operating the road in the transportation of passengers and freight, and while it is true that the railroad company was liable for the acts of the construction company (as we shall hold later on in this opinion), and that Williamson thereby became the agent of the railroad company, we do not think that these admissions made by him, under the circumstances disclosed by this record, were admissible as against the railroad company or the construction company. To make the admissions of an agent admissible as against his principal they must be a part of the *res gestæ*, or must have been made during the performance of the agent's duties. It is clear that the admissions of Williamson were not made as part of the *res gestæ*. He was not at the place of the accident, and, as said before, it was some two or three hours after the accident when he had the conversation with the newspaper reporter and it is equally clear that they were not made when in the performance of a duty to the corporation, or while any duty to the corporation was being performed by him. It seems to us

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to have been more in the nature of an application to the newspaper reporter not to publish too much about the accident in his paper, and more in the interest of Williamson individually than of the railroad company." Cited, 90/632; 107/371.

602. Sayings of employee offered to impeach him.

Where testimony as to sayings of an employee of defendant, made at a time when they could not have been considered as a part of the *res gestæ*, was admissible only for the purpose of impeaching such employee as a witness, the court, upon request of defendant's counsel, should have cautioned the jury that they should not consider such sayings as admissions binding the defendant. *Brush Electric Light & Power Co. v. Weels*, 103/512.

603. Where an employee was a mere spectator.

In *Marsh*, 56/274, a wife sued for the homicide of her husband. A., who was an employee of the company, was present and witnessed the occurrence. The local agent of the company prevented the plaintiff's counsel from learning what A. would testify. A. made statements to plaintiff and to F. immediately after the occurrence to the effect that the death was the result of the engineer's failure to put on brakes; that the agent would not allow him to communicate the facts to plaintiff's counsel until the trial, and he was afraid to tell about it lest he should be discharged. Plaintiff offered these statements in evidence and they were rejected. It was held that an employee of a railroad company who saw another employee killed by the cars can not affect the company by his declarations, made immediately after the occurrence, to the effect that the disaster was caused by the negligence of those in charge of the train, the speaker himself not being one of the number. What he, as a mere spectator, reported immediately after the homicide, as to the cause thereof, is not evidence as part of the *res gestæ*. And it was further held that improper acts by an agent touching matters out of the scope of his agency, are not to be imputed to the principal. And where the local agent of the company had interposed to prevent the plaintiff's counsel from having access to a witness in the employment of the company, it was ruled that there was no presumption that the act was authorized by the company; and that unless the delegation of such authority appeared in evidence, the corporation would be unaffected by the

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conduct of the agent. Bleckley, J., said: "It is not clear to us how the agent's conduct would be any reason for admitting the statements, if it were conceded that it was improper and that it was not within the scope of his authority." And as to the statements being part of the *res gestæ* he said: "A. was a mere spectator. His conduct was not to be illustrated, but the conduct of other persons. What he said immediately afterwards could give character to nothing that happened—could neither qualify nor explain it." Cited, 70/147; 77/213.

604. Statements parts of *res gestæ* of an investigation.

In Krogg, 77/202, a suit against two railroad companies, testimony was offered by the plaintiff that the general manager, who had full control of the roads and all the employees upon them, and who had no superior officer as to the management of the cars, engines and tracks, and whose duty it was to know everything connected with the road and to keep everything in proper order, was informed by the conductor of a train in which he was riding that the train on which the plaintiff was at work had been wrecked and where it had occurred, and thereupon remarked that he had told the roadmaster that those curves were too high; and also that he went to the scene of the wreck, and after examining as to its cause, and while pursuing his investigations, went to the plaintiff, who was the engineer of the wrecked train, and asked him what, in his opinion, caused the wreck; that the plaintiff said he thought it was a broken rail, but was not positive; that the general manager said that plaintiff was mistaken; that the plaintiff asked him, as he had made an examination since the wreck, what, in his opinion, caused it, to which the general manager responded that it was too much elevation on the curve; that the plaintiff asked if he was positive about it, to which the general manager responded, yes, he knew it, and that thereupon he would remedy that, and would have no more such accidents from that fault. It was held that these admissions or statements of the general manager were admissible in evidence. He was the alter ego of the corporation in this matter. His statements as to the condition of the road were made while in the line of his duty, it being his business to know the condition of the road, and upon being informed by an agent of the road of the wreck, what he then said was *dum fervet opus*. It was admissible also as showing knowledge of the corporation as to

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the improper construction and condition of the road before the accident. The statements of the general manager to the plaintiff were admissible further as part of the *res gestæ*, it being his duty to investigate the cause of the disaster, and such statements being made while he was pursuing his inquiries. Cited, 82/476; 85/492; 107/371. In Liddell, 85/492, it is said that this case goes to the extreme limit. The court meant that the statements were part of the *res gestæ* of the investigation which the agent who made them was then making in behalf of his principal, and not as meaning the *res gestæ* of the accident. Carson, 98/652. Cited, 112/557.

In Carson, 98/652, the defendant offered to prove the statements made by one of the employees while investigating the cause of the derailment that had injured the plaintiff. It was held that they were inadmissible as part of the *res gestæ*. Simmons, C. J., said: "To render such declarations as these admissible as a part of the *res gestæ* of the occurrence in question, they must be so nearly connected with the act 'as to be free from all suspicion of device or afterthought.' Code, § 5766. They must be so spontaneous and involuntary, so much a part of the act itself, as to render it reasonably certain that they were not the result of deliberation or reflection. Certainly this can not be said as to statements made after the accident and the injury in question had occurred, by an employee of the party who offered them, and while he was going over the ground investigating the cause of derailment, and probably seeking for such an explanation as would relieve himself and his employer from blame. Counsel for the plaintiff in error relied on what was said in Krogg's case in regard to the admissibility of statements of the general manager of the railroad company as to the cause of the accident, made at the scene of the injury soon after it occurred, and while he was engaged in an investigation of the matter. The statements referred to in that decision, however, were not, as in this instance, declarations offered by the railroad company in its own favor, but were offered by the plaintiff as admissions on the part of the company against its interest; and what was said as to their being a part of the *res gestæ* is to be understood in the sense in which this term is used in the law of agency, and as meaning the *res gestæ* of the investigation which the agent who made them was then making in behalf of his principal, and not as meaning the *res gestæ* of the accident. It was not necessary in that case, in order to render the statements admissible, that they should be treated

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as a part of the *res gestæ* of the accident, for, as will be seen from the opinion of the court, they were clearly admissible on other grounds." Cited, 112/557.

605. Where improper admission of statements no cause for a new trial.

Though declarations be no part of the *res gestæ*, their admission in evidence, unless objected to on the proper ground, is no cause for a new trial. Kitchens, 83/83.

606. Acts of negligence not declared on admitted as part of *res gestæ* to explain conduct.

Evidence tending to show acts of negligence not declared upon is admissible as a part of the *res gestæ* of the occurrence under investigation, to explain the conduct of the parties engaged in it. Being admitted, the court should charge the jury that any negligence shown by this evidence can not be considered as a direct and substantive basis of recovery; but it might be misleading to instruct them in general terms that they would "have no right to find anything against defendant because of" the same. Bleckley, C. J., said: "The court admitted evidence, the plaintiff himself being the witness, that 'the street-car man was whipping the horses, and coming pushing me; coming across that place, one of the hind wheels crossing from the left-hand side,' etc. This testimony was objected to because there was no pleading to warrant it. In admitting it, the court stated to the jury that it was not admitted as a basis for recovery by the plaintiff against the defendant, but as explanatory of the circumstances under which the injury occurred. In this there was no error. Whether whipping the horses was or was not negligence, it was a part of the *res gestæ* of the occurrence under investigation, and was relevant to explain the conduct of those engaged in it. Nor was there any error in declining to charge, as requested, that 'the jury have no right to find anything against the defendant because of the running or movement of cars, there being no allegation that their running was in any way wrong.' The court sufficiently guarded the jury against treating the manner of running the cars as a direct and substantive basis of recovery, and this was enough. Had the charge been given in the terms requested, the jury may have understood that in making up their verdict they had no right to consider the conduct of the driver of the car, even as

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explanatory of the plaintiff's conduct on the occasion. It is not necessary to allege the whole environment and *res gestæ* of the transaction, in order to admit evidence of the same, or to authorize the jury to consider and give proper weight to each relevant fact and circumstance. When negligence, which, together with the injuries sustained from it, constitutes a cause of action, is properly alleged, acts of defendant, or indeed of any one else, which tend to show why and how such negligence produced injury to the plaintiff, may be presented to the jury. It often happens that one set of acts, in themselves lawful and right, contribute materially to the production of injury by another set of acts, in themselves negligent or wrongful." Walker, 93/462.

In Barnes, 113/212, it was held that evidence of the violation by a railroad company of a valid municipal ordinance is, if the same was a part of the *res gestæ* of an occurrence under investigation, admissible, and may be made the subject-matter of appropriate instructions to the jury. Lumpkin, J., said: "During the progress of the trial, the court admitted in evidence an ordinance of the City of Macon requiring the cars of every street-railway company to be stopped before crossing the track of any other company. There was evidence tending to show that, shortly before Barnes was thrown from the car, it had, without first being brought to a standstill, crossed the track of another company. In this connection the judge charged that if the car of the defendant was not stopped at this crossing, and the failure to stop contributed to its derailment, such failure could be considered in determining whether or not the defendant was negligent. The motion for a new trial assigns error upon admitting this evidence, and upon the charge just mentioned. From a note to the motion it appears that the judge also charged that if there was a failure to stop, yet if the same did not contribute to the derailment, such failure could not be considered in passing upon the question of the defendant's alleged negligence. In the plaintiff's petition, to which no demurrer was filed, he distinctly alleged that the company's failure to comply with its duty to stop its car before passing over this crossing directly contributed to the derailment of the car, and the brief of evidence discloses that almost immediately after the car had gone over the crossing the derailment occurred."

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607. Admissions.

According to § 5784 (5197) of the Code, "All admissions should be scanned with care."

There was no error in charging that the jury should look to the circumstances under which admissions were made, and ascertain whether they were freely, voluntarily and understandingly made. *City of Atlanta v. Brown*, 73/630.

In the trial of an action for a personal injury, it is competent for the defendant to prove that shortly after the injury was inflicted the plaintiff admitted "that the injury was caused by his own fault, and that nobody was in fault but himself." Lewis, J., said: "True, if the statement were made, it would not be binding against the plaintiff, and he might show, as a matter of fact, that the injury was not due to his negligence; but at the same time the defendant was entitled to have the evidence go to the jury, that they might consider it for what it was worth." Mosely, 112/914.

In *Ingram v. Hilton & Dodge Lumber Company*, 108/194, the court, over the plaintiff's objection, allowed Dodge to testify to statements made to him by the plaintiff, while the latter was confined by sickness resulting from the injuries, to the effect that the plaintiff said he would be able to go to work on the first day of the following November, and would be satisfied if the expenses of his illness were paid up to the time he was able to resume work. This evidence was held to be admissible, as it had some bearing upon the extent of the plaintiff's injuries and the amount of compensation to which he was entitled, in case the defendant was found liable.

Plaintiff testified that he had a pass on which he was riding. When he was on the stand testifying in his own behalf defendant's counsel, on cross-examination, handed him a paper purporting to be a free pass on defendant's railroad, and asked him if his name did not appear thereon before the printed word, "agent," as the person in whose behalf the ticket was issued. Plaintiff's counsel objected on the ground that the paper was the highest evidence of its contents. The objection was overruled, and the witness answered that his name did so appear, and he thought that was the pass on which he was riding the night of the injury. After the testimony closed, plaintiff's counsel moved to rule out what he stated as to the ticket, it not having been offered in evidence. The motion was overruled, and it was held not to be error. Blandford, J., said: "This evi-

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dence of plaintiff was an admission against himself. Such testimony, when pertinent to the issue being tried, is always admissible." Henderson, 73/718. Cited, 74/666.

It was held in *Fitzgerald*, 108/507, which was a suit by a widow to recover for the homicide of her husband, that an admission by a person, tending to show that a physical injury received by him, and which subsequently resulted in his death, was caused by an accident, and not by the negligence of a railroad company of which he was an employee, was admissible in evidence for the defendant on the trial of an action for the homicide of such person, brought by his widow against that company. Fish, J., said: "As has been expressly decided, her right to a recovery must necessarily depend upon a determination of the question whether or not 'the husband, had he lived, would have had such right; and whatever would have been a good defense to his suit, had he lived, will be equally available against one brought by her.' In other words, she is to be considered in privity with the husband, in so far as her right to complain of his homicide is concerned. It follows, necessarily, that the company should have been permitted to show, by any competent evidence at its command, that the injuries sustained by him were occasioned, not by the alleged acts of negligence on its part of which complaint was made, but by other and wholly different causes. Section 5768 (5181) of our Code provides in terms that: 'The declarations and entries of a person, since deceased, against his interest, and not made with a view to pending litigation, are admissible in evidence in any case;' while § 5780 (5193) undertakes to state the rule that 'the admissions of privies in blood, privies in estates, and privies in law are admissible as against' all persons with whom they are in privity. Accordingly we think that in the present case the defendant company should have been permitted to prove that the plaintiff's husband, in undertaking to state the cause of his injuries, had 'said he was making an effort to couple cars, and that his foot struck some obstacle on the track, and he fell.' Even were she not a privy in law with him, this evidence was admissible under the rule that 'self-deserving' declarations made by a deceased person having peculiar opportunities to know the truth as to the matter under investigation may be proved even in cases between third parties, none of whom claim under or through him. See *Field v. Boynton*, 33/239; 1 Whart. Ev. § 226 et seq.; 5 Am. & Eng. Enc. Law (1st ed.), 366, and cases cited." Cited, 111/590; 129/526; 116/656.

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There was no error in charging that it was the duty of the jury to scan admissions, if proved, with care, but, that, so scanning them, the jury should give them such weight as they thought such admissions entitled to. McBride, 125/515.

Statements made by one person in the presence of another, to the effect that the latter was alone responsible for injuries he had received, may, if silently acquiesced in by him, amount to an admission on his part that such statements are true. Holston, 116/656.

The return of a taxpayer, as contained in the tax-receiver's digest, may be considered by the jury on the issue of the value of the property therein included, as an admission. Such admission is not conclusive evidence of the value of the property. An instruction which does not in terms state that the jury may consider such return as in the nature of an admission, but states that they may consider it as a circumstance of the case, will not require the grant of a new trial. Tate, 129/526.

Where, in a suit by an employee against a railroad company to recover for a personal injury, a paper was introduced in evidence, apparently made out on a prepared form, which stated that the injury to the employee was not due to any negligence or carelessness on the part of any coemployee or foreman, but that the accident was one of the ordinary risks of the service, and that the railroad company and its officers, agents, and employees were in no wise to blame, and which recited the manner in which the injury occurred, and was signed by the plaintiff, there was no error in instructing the jury that such paper was not a release or discharge of the company from liability, but was simply an admission upon the part of the plaintiff; nor in adding that, under the law, admissions are scanned with care, and that the jury could consider such admission in the light of all the facts and circumstances connected with the transaction, as shown by the evidence. After charging as indicated in the preceding headnote, it was error to add, in regard to such an admission, that "It simply goes to his credit." Such an admission of a party is not limited to the mere purpose of discrediting his testimony. Bradford, 135/522.

If a person who claimed to have been injured while alighting from a railroad car, in answer to a question by an employee of the company as to how it occurred, made an admission tending to show that the injury resulted from the accidental slipping of her foot in getting off the car while it was standing still, and not from any

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negligence on the part of the company's employees; and if such statement was freely and voluntarily made, and did not appear to be an admission or proposition made with a view to a compromise, it was admissible in evidence, although after making it she proposed to the agent of the company that a compromise be made. The mere fact that admissions of a party to a suit may have been proved, and that they do not accord with the testimony given by him as a witness examined by interrogatories, does not render evidence admissible for the purpose of showing that he had previously made to another witness statements consistent with his testimony. *McBride*, 125/515.

Where certain allegations in a plaintiff's petition were admitted in the original answer of the defendant, but subsequently the answer was amended by striking therefrom these admissions and denying the truth of the allegations, and on the trial the plaintiff tendered in evidence the admissions contained in the original answer, and the defendant introduced no evidence to explain or controvert them, a motion for a nonsuit on the ground that these allegations were not supported by the evidence was properly overruled. *Guilford*, 119/523.

608. Their weight as evidence.

Where the judge has substantially charged the law as embodied in the Code on the subject of admissions, it is not error for him to omit to add, in the same connection, that admissions, when established to the satisfaction of the jury, constitute a high degree of evidence, and should be entitled to great weight. *Lewis, J.*, said: "There is nothing in the provisions of this section of the Code, nor in any other statute of the State, which declares that, when an admission is established to the satisfaction of the jury, it constitutes a high degree of evidence, and the jury should give it great weight. It may be sound philosophy, founded upon human experience and a knowledge of human character, that an admission, made voluntarily by a party against his own interest, constitutes very strong evidence of the fact admitted. It is often the case that learned writers of law-books, and even courts, in the discussion of principles involving the weight of testimony and the credibility of witnesses, advance ideas, sound in themselves, which are not intended to be declared as positive law, but as a safe rule to guide mankind generally in reaching conclusions upon stated facts; but it does not follow from this

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that, however sound the philosophy of such rules may be, a court should adopt them as positive law, apply them to a particular case, and give them as rules by which the jury should be governed in their deliberations. The weight of testimony and the credibility of a witness are peculiarly and exclusively, under the law of Georgia, questions for the jury; and, unless the statute expressly specifies how certain testimony should be received, what weight should be given it, and whether it should be scrutinized with caution or care, it is, to say the least, a safer plan always for the judge to express no opinion upon the subject, but to leave the matter entirely with the jury. In some instances, no doubt, the admissions of a party against his interest are entitled to great weight; but what weight should be given them would depend largely upon the circumstances under which they were made. As to the effect of such circumstances upon the weight of the testimony, the jury alone should judge." *Allen*, 106/572. Cited, 125/518.

609. Credibility of witnesses.

In *Attaway*, 90/656, it was determined that, where the testimony of witnesses is conflicting, it is not error for the court to instruct the jury that they should believe the witness or witnesses whom they consider most worthy of belief, and that, in order to arrive at a conclusion as to which are most worthy of belief, they may look to the manner of the witnesses while testifying, their means of knowledge as disclosed by the evidence, and their bias or prejudice, if any has been shown by the testimony, and should see to what extent they have been impeached or corroborated, if at all.

In *Maltsby*, 90/630, it was held that in so far as the evidence of an employee of one of the parties conflicts with that of other witnesses, the jury may look to his employment as a fact which may affect his credibility. Cited, 125/87.

That some boys pointed out a hole to the plaintiff's husband, and said it was the one into which the plaintiff fell, and that the husband afterwards pointed out the same to another witness, and said it was the hole into which his wife fell, is not competent evidence; but that a hole was found and examined by the witnesses at the street intersection where the plaintiff testified the hole was would be competent evidence, it not appearing that there was more than one hole at this street intersection. It would be a question for the jury whether all the testimony referred to the same hole. *Brunswick Light, etc., Co. v. Gale*, 91/813.

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On the trial of an action against a railroad company for personal injuries, it was improper to admit parol evidence tending to show that the plaintiff had been charged with or tried for a criminal offense. Simmons, C. J., said: "A witness may be discredited by showing his conviction for an offense, but it is not competent to discredit him by showing merely that he has been charged with and tried for an offense. Until there is proof of conviction, he is protected by the legal presumption of innocence. Moreover, the judgment of conviction must be proved by the record. Rap. Wit. § 201, and cases cited; *People v. Elster* (Cal.), 3 Pac. 884; *Van Bokkelen v. Berdell*, 130 N. Y. 145, 29 N. E. 254, and cases cited. And see *Gardner v. State*, 81/144." Killian, 97/727.

A false statement in the testimony of a witness can not be converted into truth by any amount of corroboration as to other matters; for a "fact disproved" is not a fact. An attempt to impeach a witness "by disproving the facts testified to by him" may or may not be successful. Barnett, 104/582.

In Stevens, 80/19, Simmons, J., said: "The plaintiff, in his declaration, and in his evidence before the jury, complained that his spine was badly injured by reason of his fall in attempting to reach the railroad-track; indeed, that spinal concussion or something of that sort had been produced by the fall. We think that any evidence going to contradict this would be admissible. This evidence, which was objected to and which the plaintiff sought to have ruled out, was to the effect that the plaintiff had exchanged photographs with a negro girl on the afternoon before he was injured, and had made an assignation with her for the next day; and on the morning of the next day he walked four or five miles in the direction of where she lived. If he did make the agreement to meet this girl, and walked that distance for this purpose, it would certainly throw light upon his physical condition after the injury; and the jury might well conclude that his spine was not so badly injured as he claimed it to be. We therefore see no error in the refusal of the court to rule out this evidence. It is not only admissible to throw light upon the particular injury complained of to the spine of the plaintiff, but also upon the general physical condition of the plaintiff after he was injured. The court therefore did right in not limiting the effect of it to the extent of plaintiff's spinal injuries. Being competent and legal evidence, it was admissible for all purposes, and the jury had a right to give it such weight as they saw proper to give it."

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The credibility of witnesses being a question entirely for the jury, any fact or circumstance that would tend to throw light on that question, or that would assist the jury in weighing the testimony, is proper and relevant. The age, the business, the condition of a witness, whether married or unmarried, and whether he has children, frequently illustrate the question of his credibility. *Ransom*, 5 G. A. 740.

Any fact which tends to show the interest or lack of interest of a witness in the result of the suit is admissible in evidence. *Stanley*, 1 G. A. 487.

In *Bagley*, 121/781, it was held that the fact that a witness is an employee of one of the parties is a proper matter to be considered by the jury in passing upon his credibility. *Cobb, J.*, said: "It is also complained that the court, after charging the jury that the fact that witnesses were employees of the defendant was no reason for disbelieving their testimony, added, 'except in determining what weight and credit you will give to the testimony of the witnesses.' The court stated the rule with absolute correctness. The fact that a witness is an employee of a party to a case is a matter bearing upon the interest of the witness, which the jury may consider in passing upon his credibility; and it was not error to instruct the jury to this effect."

In *Hobbs*, 121/428, it was held that the testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him when it is self-contradictory, vague, or equivocal. *Evans*, 96/481; *Freyermuth*, 107/32; *Ray v. Green*, 113/920; *Farmer v. Davenport*, 118/289. And he "is not entitled to a finding in his favor if that version of his testimony the most unfavorable to him shows that the verdict should be against him." *Southern Bank v. Goette*, 108/796. Cited, 123/237; 4 G. A. 354. This is repeated in *Steele*, 123/237, and also in *Tuten*, 4 G. A. 353.

610. Impeachment of witnesses.

Where a witness, by way of accounting for his presence at the scene of the killing of an animal, states that immediately before going there he made a particular purchase at a certain store, evidence is admissible, in behalf of the opposite party, showing or tending to show that he made no such purchase on the occasion referred to. While this fact is not directly material on the circum-

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stances of the killing, it is indirectly material, because it contradicts the witness as to the train of events which led him to be present, and thus tends to discredit him as to the facts of his presence. Daniel, 91/768.

Though the verdict can not be supported unless the evidence of a particular witness be true, and though that witness was directly contradicted by two of the employees of the railroad company, and his character attacked by one of these and two others, and though the witness admitted that he had signed a false report of the matter, written by an agent of the company, yet as the jury, notwithstanding all these discrediting circumstances, believed the witness, and based their verdict upon his testimony, and the trial judge, by overruling the motion for a new trial, approved the finding, this court, not being able to know with full certainty where the truth of the controversy lies, and being disposed, in all cases, to recognize the right of the jury to determine the credibility of the witnesses, especially when the presiding judge is satisfied, will not reverse the judgment denying a new trial. Merrett, 92/486.

Unless a particular witness, in behalf of the plaintiff below, testified truly, the verdict would be an outrage upon justice. The credibility of this witness was attacked by every means known to the law, including contradiction by another witness, evidence of bad character, and his own previous affidavit to a written report of the facts, at variance with his testimony at the trial. Yet the jury, if not themselves corrupt, must have believed him, for they found for the plaintiff; and, the court below having approved their finding, this court is constrained by law to acquiesce. Relatively to the revising powers of this court, the jury are the exclusive judges of the credibility of witnesses. The law provides for setting aside judgments obtained by perjury after conviction of that offense. Barnett, 94/446. Cited, 101/20.

The testimony of the plaintiff, who was the sole witness in his own behalf as to the circumstances under which he was injured, making at best a very weak and doubtful case, it being as a whole utterly inconsistent with itself and self-contradictory as to the most vitally important facts, and one version of it showing clearly that he was not entitled to recover, and the defendant's evidence, which was perfectly consistent with this version, establishing a complete defense, the verdict in the plaintiff's favor was unwarranted, and the ends of justice require a new trial. Evans, 96/481. Cited, 119/835; 121/428.

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A witness can not be impeached by proof of contradictory statements without laying the foundation for the same, by calling his attention "with as much certainty as possible to the time, place, person, and circumstances attending the former statement." This rule is not varied where the testimony of the witness was taken by depositions and the alleged contradictory statements made afterwards and before the trial. Bradshaw, 113/862.

Where it is sought to impeach a witness by proof of unsworn statements contradictory to his testimony given on the trial, foundation for the impeachment must first be laid by directing the attention of the witness to the alleged contradictory statements, with the particularity prescribed by the Code, § 5881 (5292). The inaccessibility of the witness at the time it is sought to lay this foundation does not justify a departure from the rule. Sasser, 4 G. A. 276.

In a case of the character disclosed by the present record, it is competent to prove, for the purpose of impeaching a witness who has testified that the fire, was caused by other agencies than the railroad company, that on the night upon which the fire occurred he expressed a decided conviction that the fire was caused by the railroad company. Trammell & McCowan, 114/312.

Where an attempt is made to impeach a witness by proof of contradictory statements previously made, the witness may explain the statement previously made, by showing that it was not made with reference to the transaction then being investigated, but was made with reference to another transaction, that happened at a different date, and may also give the details of the former transaction, for the purpose of showing that they corresponded with the alleged contradictory statements previously made. Dougherty, 4 G. A. 615.

If it was desired to discredit the evidence of a witness for the defendant by showing that his testimony delivered on the stand was not in accord with a written report which had been made by him to the defendant, and which he stated, on cross-examination, he had used to refresh his memory, the report itself was the best evidence of its contents; and it was erroneous to allow counsel for the plaintiff to inquire of the witness if he had made a report to the company which contained any such statement as that to which he was then testifying, and to elicit from the witness an answer that he did not "exactly state that in the accident report." But where, on redirect examination, the written report was handed to the witness and, after an examination of it, evidence was elicited from

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him by counsel for the defendant, without objection, which showed the contents of the report on the subject under inquiry, and which was not materially different from that which had been brought out on cross-examination, the allowance of the question and answer on cross-examination will not require a reversal. Crawford, 130/421.

It is not competent, for the purpose of sustaining a witness and showing that he was present and saw an occurrence, to prove that he afterwards told different persons that he was present and did witness the occurrence. Strickland, 116/439.

A witness can not be impeached by proving association with a man of bad character. Vaughn, 113/354.

It is not error in the part of the trial judge to fail to charge the jury on the law relating to the impeachment of witnesses, in the absence of a proper request so to do. Thompson, 113/983.

The court should not charge upon the subject of the impeachment of witnesses by proof of general bad character when the evidence discloses that no attempt was made by either party to thus impeach a witness. O'Bryan, 119/147.

The charge of the court on the subject of impeaching witnesses referred to only one method of impeachment, when the evidence tended to show impeachment both by contradictory statements and by general character. It was, moreover, fragmentary and confusing. *Southern Cotton Oil Co. v. Skipper*, 125/368.

If the court undertakes to instruct the jury as to the methods by which a witness may be impeached, he should instruct them as to all the methods of impeachment, so far as such instructions are authorized by the evidence; but his failure to do so will not require the granting of a new trial, where no written request was made to charge the jury as to the mode of impeachment omitted by him from his instructions upon the subject of impeachment of witnesses. Allen, 130/656.

The rule of evidence, *falsus in uno falsus in omnibus*, is applicable only to cases where a witness swears to a falsehood willfully and knowingly; but in a case where the only testimony to which it could apply must in the nature of things be either true or knowingly false, it is not error requiring the grant of a new trial for the court to charge the jury that "The principle of law to be applied to the testimony of witnesses is, that if you find them false in one thing, the presumption is they are false in everything testified." Glenn, 121/80.

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611. Examination of plaintiff and person injured.

In *Childress*, 82/719, it was held that it is within the discretion of the trial court to require the plaintiff, suing for a physical injury alleged to be permanent, to submit to an examination by competent physicians, at the instance and at the expense of the defendant in the action, to ascertain the nature, extent and probable duration of the injury, so as to afford means of proving the same at the trial. By the Code, § 4644 (4047) every court has power to control in furtherance of justice the conduct of all persons connected with a judicial proceeding before it in every matter appertaining thereto. Bleckley, C. J., said: "As to the suggestion made in argument, that the rule would operate hardly upon delicate and modest females, we can only say that they would be safely guarded by the discretion of the trial judge. There would be no danger, we think, in this country, of an examination being ordered needlessly or where an improper shock to modesty or feeling of delicacy would be likely. We decide simply that the power exists, and that in each case it is to be exercised or not, according to the sound discretion of the presiding judge." Cited, 99/255; 109/612.

In *Wainwright*, 99/255, it was held that the Supreme Court will not reverse the action of a trial judge in refusing, pending the trial of a suit for personal injuries, to order a medical examination of the plaintiff, when it appears that no request for such an examination was made of the plaintiff before the trial began, and no request to this effect was made of the court until after the plaintiff's evidence had been closed, and it was then impracticable, without too long a suspension of the trial, to obtain a satisfactory and competent physician, by whom an impartial examination could be then made. While the power to order such an examination exists, it is in each case to be exercised or not, according to the sound discretion of the presiding judge.

There was no error in refusing to require the plaintiff, during the trial, to submit to a medical examination at the instance of the defendant; it appearing that she had previously been several times examined by physicians, one of whom was sworn as a witness for the defendant. *The Southern Bell Tel. Co. v. Lynch*, 95/529.

In *Bagwell*, 109/611, it was held that an action by a father for the loss of the services of his minor daughter, occasioned by personal injuries, should not be dismissed because she, after reaching her majority, refused to obey an order of the court in which the

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action was pending, requiring her to submit to a physical examination of her person by a physician. Lumpkin, P. J., said: "It would be going to a great length to hold that such an action by a father should be defeated by the refusal of the daughter who, though not quite twenty-one years old, was practically a grown woman, to submit her person to a physician for physical examination. Certainly, if, as was alleged in this case, the physician, though eminent in his profession and a thorough gentleman, was distasteful to the daughter, it would have been placing upon the father, even if she had still been under his control, a great and painful burden to coerce her to undergo an examination, or else give up his cause of action. But that is not the case with which we are now dealing, for the record shows that the refusal upon which the judge's order of dismissal was based was made by the daughter after she had become of age. At that time her father had no right or authority to control her person or her movements. His conduct would have been indefensible, if not criminal, if he had undertaken to compel her, against her will, to allow a physician to examine her. No humane father would, at any cost, attempt such a thing. It may be that, if he really desired the examination to take place, he might, by perfectly proper means, have induced his daughter to consent to it. Be this as it may, we are not prepared to hold that he was, in any event, bound to pursue such a course; and, moreover, it distinctly appears, as already remarked, that this case was dismissed solely on the ground that Miss Bagwell refused to submit to the examination which the court had ordered to take place. We have no hesitation in holding that a case should not be thrown out of court because of the conduct of one not a party to it, and who was neither legally bound to obey the plaintiff's orders, nor subject to his custody or control."

The power of the trial court to require a plaintiff, suing for a physical injury alleged to be permanent, to submit to an examination by a competent physician, at the instance and expense of the defendant, in order to ascertain the nature, extent, and probable duration of the injury, is one to be exercised or not according to the sound discretion of the presiding judge, under the facts of the case; and a refusal to require such a submission will not be reversed, unless his discretion has been abused. Citing, *Childress*, *Wainwright*, and *Vining* cases, *supra*.

Where the motion for a new trial showed that a motion of the

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character above indicated was made several times during the progress of a trial, but was refused by the presiding judge on the ground that he could not grant the application without interfering with and delaying the trial, and there was nothing to show any abuse of discretion in such ruling, a reversal will not be granted on that ground. Ross, 133/83.

In Vining, 120/511, it was held that the application by the defendant to suspend the trial for the purpose of having the plaintiff examined by a physician was addressed to the sound discretion of the court, and the record does not disclose such an abuse of this discretion as would authorize the Supreme Court to interfere. Cobb, J., said: "During the progress of the case and on the second day of the trial the plaintiff introduced as a witness a physician, who had examined her on that day, and who testified as to the character and extent of her injuries. After this witness had been examined, the defendant's counsel moved the court to nominate some physician to examine the plaintiff, as the physician who had testified in behalf of the defendant had not seen the plaintiff for several months prior to the trial. The judge overruled the motion, and in a note to the motion for a new trial states that there were no other witnesses to be examined after the motion was made, that the case was ready for argument, that argument actually began within five minutes, and that on account of the congested condition of the calendar of the court he did not feel justified in suspending the trial for the purpose of having the examination made. Applications of this character are, under all circumstances, addressed to the sound discretion of the court. Childress, *supra*. Where an application of this character is made pending the trial, which if granted would result in a suspension of the trial and a delay of the business of the court, it would take a strong case for this court to reverse a judgment refusing the application. Under the circumstances of the present case there was no abuse of discretion in refusing the application. Wainwright, *supra*." Cited, 133/83.

It is within the discretion of the trial judge, upon a proper showing made therefor and at the instance and expense of the defendant in the action, to require a plaintiff, suing for physical injuries, to submit to an examination by competent physicians in order to ascertain the nature and extent and probable duration of the injury, and to afford means of proving the same at the trial of the cause. Childress, 82/719. It follows that it is likewise within the discre-

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tion of the judge to refuse to require such examination, and this discretion will not be controlled unless abused. Proper exception must be taken to such refusal on the part of the trial judge, before it can be considered by this court. (Per Hill, C. J., and Powell, J.) It is error for the court to refuse to permit the defendant, in a suit for alleged permanent personal injuries, to prove that the plaintiff had refused to allow a committee of competent, disinterested physicians to make a reasonable physical examination, upon a timely request therefor, in order that the extent of the injury might be ascertained, Russell, J., dissenting. *City of Cedartown v. Brooks*, 2 G. A. 583.

612. Jury may apply their knowledge of arithmetic.

In a suit brought to recover damages for a homicide the trial judge, after telling the jury that a book had been introduced in evidence to aid in calculations which they would make, charged them: "You can use the rules in that book, or can take any other rules or information that you possess that refer to making calculations." It does not appear from the report of the case what book was referred to, but the charge was approved, and it was held that, in making a calculation, the jury may apply their knowledge or information of arithmetic, without its being formally introduced in evidence. *Pittman*, 73/325.

MORTALITY AND ANNUITY TABLES IN ESTIMATING DAMAGES.**613. Mortality and annuity tables are admissible in evidence.**

It has been ruled in a number of cases, that mortality and annuity tables of established reputation are admissible in evidence in cases of tort when death has been caused, and also where permanent injuries have been inflicted causing a total destruction of, or material diminution in, the earning capacity of the injured person. *Oaks*, 52/410.

When, in the trial of an action brought by a husband for the loss of his wife's services, there was evidence to warrant a finding that the injuries of the wife were permanent, the mortality and annuity tables were properly admitted in evidence. *Ware*, 112/663.

It is not a good objection to the admission in evidence of the Carlisle mortality table, and the table showing the value of an-

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nuities according to the Carlisle mortality table, that the accuracy and correctness of such tables have not been shown. These, being standard tables, are admissible in evidence, not as conclusive proof of the expectancy of life of a certain person and the present value of an annuity, but as data which may be considered by the jury in determining such questions when made. Cox, 115/714. Cited, 118/453; 2 G. A. 807.

The Carlisle mortality and annuity tables are standard tables, and will be admitted in evidence without proof of their correctness or that they are what they purport to be. Monk, 118/449.

A mere statement in a brief of evidence that the plaintiff "introduced in evidence the mortality and annuity tables in the seventieth Georgia Report" does not authorize this court to take judicial cognizance of the contents of the tables published by the official reporter as an appendix to that volume. Simmons, C. J., and Lewis, J., dissenting. Hyer, 113/776. Dis., 115/716; 118/453. To the same effect, Jackson, 1 G. A. 632.

Where the jury found that the plaintiff was not entitled to recover any amount as damages, the rejection from evidence of tables of life-expectancy, and a charge on the subject of the measure of recovery for diminished capacity to earn money on the part of a woman who married after the injury, will not require a reversal, whether erroneous or not, unless it appears that such rulings were in some way calculated to affect the finding of the jury on the question of liability or non-liability. McBride, 125/515.

Where the plaintiff in his testimony gives his age, his occupation, his condition of health before and after his injuries, and his earning capacity when injured and subsequently, sufficient data are given to enable the jury to determine how long he will probably live and labor, and how much the pecuniary value of his life has been diminished by the injuries. The jury are authorized to make this calculation without the assistance to be derived from mortality and annuity tables. Petway, 7 G. A. 659.

While the evidence on the subject of whether the injury to the plaintiff was permanent in character was conflicting, there was enough to authorize the admission in evidence of the mortality and annuity tables, and the giving of a charge in regard to them. Bradford, 135/522.

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614. The foundation for their admission must be laid.

In *Richards*, 62/306, a witness was offered to prove the tables. He stated that his business was that of a life-insurance agent; that he was acquainted with it sufficiently to conduct it, though he would not consider himself an expert; that he knew the tables used by insurance companies to estimate probable length of life. He then described them and attached copies to his answers. This testimony was objected to on the ground that the witness was not an expert. It was ruled that tables proved to have been used by life-insurance companies by one who had been in the business for years, though not claiming to be an expert as to the tables, are admissible to show the probabilities of the duration of life. *Jackson, J.*, said: "He was expert enough to have been employed for years about the business of life-insurance and to know what tables were used, and we see nothing wrong in admitting the evidence."

615. Further foundation must be laid.

Before the tables can be properly admitted in evidence, to show the expectancy of the plaintiff and aid the jury in arriving at the amount of damages he should recover for a permanent injury, the foundation should be laid by proving the plaintiff's age, or introducing evidence from which his age could be inferred or approximately arrived at by the jury. *Beauchamp*, 93/6.

And the tables are not proper evidence, and instructions as to their use are inappropriate, unless there be some evidence as to the value of the plaintiff's services, or capacity to earn money. Proof of the plaintiff's age, and also the nature of his services, are not sufficient without proof as to value. *Moore*, 99/229. Cited, 122/95; 6 G. A. 178.

Where there is evidence tending to show that the state of impaired health and diminished ability to labor, attributable to the injury, may endure through life, the mortuary tables are admissible in evidence to aid the jury in dealing with the element of time involved in their computation of the damages. Chief Justice Bleckley said: "There was such evidence in this case, and the tables were, therefore, relevant. One who is to live long in pain is more damaged than one who has to endure suffering but for a brief term. Test this by applying it to two cases and contrasting them, the first in which pain is to last only for a day, and the second for

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twenty years. It may be thought that the loss of ability to labor is not pain, but this is a mistake. There is no greater blessing of life than ability to labor, even though the proceeds may belong to another. It is better for happiness, as well as for virtue, to work for nothing than to be idle. A physical injury that destroys the power of a human being to labor is one of the most serious injuries which it is possible to inflict. True, it is not to be measured by pecuniary earnings where the suit is by a married woman, for such earnings, as a general rule, belong to the husband, and the right of action for their loss is in him, but the wife herself has such an interest in her working capacity as that she can recover something for its destruction, and what she is to be allowed ought to be more or less according to the length of time during which her privation is likely to continue. Such privation may well be classed with pain and suffering, especially where it involves the breaking up of established habits. To man or woman accustomed to work, enforced idleness is torture." Powell, 77/192. Cited, 133/235; 6 G. A. 178.

"On the trial of an action for personal injuries alleged to be permanent, mortality tables are not proper evidence, and instructions as to their use are inappropriate, unless there be some evidence as to the value of the plaintiff's services or capacity to earn money." Gardner, 122/82. Criticised, 6 G. A. 178.

The evidence conflicting as to whether or not the plaintiff's injuries were permanent, it was not error to admit in his behalf the tables to aid the jury in arriving at the proper amount of damages in case they should determine that the injuries were permanent and that the plaintiff was entitled to recovery. Garner, 91/27. Cited, 115/717; 118/453.

Evidence of the condition of the injured party after the suit was brought, as well as before, is admissible to show the nature and effects of the injury, and whether temporary or permanent. Powell, 77/192.

616. The value of the tables when admitted.

The tables are not binding upon the jury and they are not obliged to use them, or either of them. Burney, 98/1.

They are not conclusive or absolutely essential, but may be considered by the jury as data on which they may act. Crosby, 74/737.

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Stewart, 71/427. The law merely permits jurors to use the tables ; it does not require them to do so. McLeod, 94/530.

In charging the jury touching the measure of recovery, the court said: "In determining the value of the life of deceased you consider his age, his expectancy of life, the amount he was earning when killed, his capacity to earn money in the vocations of life in which he was engaged. It is the cash value of the life that is to be given, not the gross amount he would have received during the term of years the tables say he could reasonably have expected to live. It is the gross amount reduced to present cash value." This charge was subject to misconstruction. Neither here nor elsewhere was the charge quite full enough as to the right of the jury to avail themselves of facts in the evidence irrespective of the mortality-tables. Glover, 92/132.

The judge may properly instruct the jury, in explanation of the use of the mortality and annuity tables, that "if, under the evidence, the expectancy would be greater or less than that of the average man, or the earning capacity would increase or decrease, the cash value of the life should be increased or decreased accordingly," when there is evidence that the person, the value of whose life is in question, was a young man of good health and habits, and was filling satisfactorily a responsible position. Minor, 2 G. A. 804.

In Clark, 117/548, it was held that in an action of tort, where the amount of the verdict is under the facts large and full, an erroneous charge, calculated to mislead the jury as to the manner in which they should arrive at the damages to be assessed, will require the granting of a new trial. Where an erroneous rule of law is given to the jury on a material issue in the case, and is of such a nature as is calculated to mislead them, a new trial will be granted notwithstanding the correct rule may have been announced in other portions of the charge. Applying the rules above stated to the facts of the present case, it was error requiring the granting a new trial for the court to charge the jury as follows: "On page 845 of the mortality table, under the head of 'age' you will find the figures '32'—there is no controversy as to the age of the deceased. Opposite that, under the head of 'expectation years,' you will find the figures '33.03.' Those are the years of his expectancy. Then if you use the annuity table, which would be a shorter calculation than by the mortality table, you may look under the head

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of 'age,' and you will find the figures 33. These are the years of his expectancy, and then opposite and to the right of that you will find under the 7 % column the figures 11.448. Having already found what you believe to be a fair average yearly value of the services of the deceased, you will multiply that by 11.448, and that will give you the amount of your verdict." The errors thus made were not cured by a proper qualification of the rules stated, in another portion of the charge. Cobb, J., said: "The error, it seems to us, in the charges complained of is that the jury are instructed that if they do see proper to use the tables they must use them only in a certain way. They are not instructed that the table of mortality is simply an aid in determining what was the expectancy of the deceased, but they are in effect told that if they use the mortality table, as they have a right to do, the expectancy of the deceased is 33 years. As is well known, mortality tables are compiled from facts learned from observation and experience, taking a large number of persons from all classes of life, and thereby ascertaining the average age that one would probably live. If one is engaged in a dangerous occupation, the probabilities are that his expectancy would not be as long as that indicated by the tables. If one is engaged in an occupation that is almost entirely free from those dangers which imperil life, the probabilities are that his expectancy would be longer than that indicated in the table. In cases where the mortality table is relevant as evidence, the jury should always be told that it is simply an aid to be used along with other evidence in determining what would be the expectancy of a person whose duration of life is under consideration. It will be error in any such case for the court to tell the jury that the expectancy of an individual would be the age indicated by the table. While the table is a valuable aid to the jury, it is not binding and conclusive upon them in any case."

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617. Mortality and annuity tables.**"CARLISLE MORTALITY-TABLE."**

Expectation of life at ages named according to the observations made at Carlisle by Dr. Heysham. Page 845, 70 Ga. Reports:

Age.	Expectation Years.	Age.	Expectation Years.	Age.	Expectation Years.	Age.	Expectation Years.
0	38.73	26	37.14	52	19.68	78	6.13
1	44.68	27	36.41	53	18.97	79	5.80
2	47.55	28	35.69	54	18.28	80	5.51
3	49.82	29	35.00	55	17.58	81	5.21
4	50.76	30	34.34	56	16.89	82	4.93
5	51.25	31	33.68	57	16.21	83	4.65
6	51.17	32	33.03	58	15.55	84	4.39
7	50.80	33	32.36	59	14.92	85	4.12
8	50.24	34	31.68	60	14.32	86	3.90
9	49.57	35	31.00	61	13.82	87	3.71
10	48.82	36	30.32	62	13.31	88	3.59
11	48.04	37	29.64	63	12.81	89	3.47
12	47.27	38	28.96	64	12.30	90	3.28
13	46.51	39	28.28	65	11.79	91	3.26
14	45.75	40	27.61	66	11.27	92	3.37
15	45.00	41	26.97	67	10.75	93	3.48
16	44.27	42	26.34	68	10.23	94	3.53
17	43.57	43	25.71	69	9.70	95	3.53
18	42.87	44	25.09	70	9.18	96	3.46
19	42.17	45	24.46	71	8.65	97	3.28
20	41.46	46	23.82	72	8.16	98	3.07
21	40.75	47	23.17	73	7.72	99	2.77
22	40.04	48	22.50	74	7.33	100	2.28
23	39.31	49	21.81	75	7.01	101	1.79
24	38.59	50	21.11	76	6.69	102	1.30
25	37.86	51	20.39	77	6.40	103	0.83

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TABLE

Showing the value of annuities on single lives according to the Carlisle table of mortality. Page 847, 70 Ga. Reports:

Age.	6 per cent.	7 per cent.	Age.	6 per cent.	7 per cent.	Age.	6 per cent.	7 per cent.	Age.	6 per cent.	7 per cent.
0	10,439	9,177	27	13,275	11,832	53	9,988	9,205	79	4,040	3,883
1	12,078	10,605	28	13,181	11,759	54	9,761	9,011	80	3,858	3,713
2	12,925	11,342	29	13,096	11,693	55	9,524	8,807	81	3,556	3,523
3	13,652	11,978	30	13,020	11,636	56	9,280	8,595	82	3,474	3,352
4	14,042	12,322	31	12,924	11,578	57	9,027	8,375	83	3,286	3,174
5	14,325	12,574	32	12,860	11,516	58	8,772	8,135	84	3,102	2,999
6	14,460	12,698	33	12,771	11,448	59	8,529	7,940	85	2,909	2,815
7	14,518	12,756	34	12,675	11,374	60	8,304	7,743	86	2,739	2,652
8	14,526	12,770	35	12,573	11,295	61	8,108	7,572	87	2,599	2,519
9	14,500	12,754	36	12,465	11,211	62	7,913	7,403	88	2,515	2,439
10	14,448	12,717	37	12,354	11,124	63	7,714	7,229	89	2,417	2,344
11	14,384	12,669	38	12,239	11,033	64	7,502	7,042	90	2,266	2,198
12	14,321	12,621	39	12,120	10,939	65	7,281	6,847	91	2,248	2,180
13	14,257	12,572	40	12,002	10,845	66	7,049	6,641	92	2,337	2,266
14	14,191	12,522	41	11,890	10,757	67	6,803	6,421	93	2,440	2,376
15	14,126	12,473	42	11,779	10,671	68	6,546	6,189	94	2,492	2,419
16	14,067	12,429	43	11,668	10,585	69	6,277	5,945	95	2,522	2,451
17	14,012	12,389	44	11,551	10,494	70	5,998	5,690	96	2,486	2,420
18	13,956	12,348	45	11,428	10,397	71	5,704	5,420	97	2,368	2,309
19	13,879	12,305	46	11,296	10,292	72	5,421	5,162	98	2,227	2,177
20	13,835	12,259	47	11,154	10,178	73	5,170	4,927	99	2,004	1,964
21	13,769	12,210	48	10,998	10,052	74	4,944	4,719	100	1,598	1,569
22	13,697	12,156	49	10,823	9,908	75	4,760	4,549	101	1,175	1,159
23	13,621	12,098	50	10,631	9,749	76	4,579	4,382	102	0,744	0,735
24	13,541	12,037	51	10,422	9,573	77	4,410	4,227	103	0,314	0,312
25	13,456	11,972	52	10,208	9,329	78	4,238	4,067			
26	13,368	11,904									

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618. Proper method of using the tables.

In Burney, 98/1, Lumpkin, J., said with reference to the methods of using the mortality and annuity tables when, in their complete form, they were in evidence: "As cases of tort are constantly arising, both where death has been caused, and also where permanent injuries have been inflicted, occasioning a total destruction of, or a material diminution in, the earning capacity of the injured person, and generally, on the trial of such cases, these tables are introduced in evidence, and as there is much confusion with reference to the manner of using them, we have concluded to undertake the formulation of instructions concerning their use, which, in each class of cases, respectively, may be appropriately given in charge. It must not be understood that in so doing we are presuming to dictate to our brethren of the trial courts as to how they shall charge on this subject, or to prescribe forms which they must feel constrained to follow; but, as we have devoted much study and thought to this particular matter, we venture to hope that the 'charges' below suggested may be found helpful. The plaintiff in the present action sought to recover damages for an alleged permanent diminution in his earning capacity; and it was not, therefore, a case in which the value of a life was involved. It will, however, in pursuance of the plan we have adopted, be more convenient to present first suitable instructions concerning the use of the tables in a case where death was caused, and then conclude with instructions appropriate to a case like the one now in hand. These instructions, as a whole, can, by making the needed changes in phraseology, be rendered readily adaptable to a case of tort in which there was no death, but a total destruction of earning capacity. On pages 844, 845 and 846, of 70 Ga., will be found, respectively, the Northampton, the Carlisle, and the Actuaries' mortality-tables; and on page 847 is a table 'showing the value of annuities on single lives according to the Carlisle table of mortality.' In order to avoid complication, we shall frame our 'charges' upon the assumption that only the tables on pages 845 and 847 are before the jury, and shall designate the last simply the 'Annuity-Table.' Of course, if the other tables mentioned, or tables which have not been mentioned at all, are properly in evidence, the instructions may be varied accordingly. With reference to the 'six per cent.' and 'seven per cent.' columns in the annuity-table, we have thought it best that juries should be restricted to the use of the latter only,

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because seven per cent. is the legal rate of interest in this State when none is fixed by contract in writing, and calculations of annuities based upon any other rate would be purely arbitrary. Indeed, the table in the book referred to might have had, in addition to those it now contains, a five per cent. column and an eight per cent. column, or any other number of columns based on different rates of interest, in which event there would have been no safe criterion save that just indicated, as to which of them a jury should select. With the table as it stands, limited to the two columns, there is no good reason for taking the one rather than the other, except that which is stated above. The instructions we have undertaken to frame for the guidance of the jury in that class of cases in which the plaintiff seeks to recover for the homicide of another have, of course, been prepared with reference to the rule of law prevailing in this State which allows such plaintiff to recover 'the full value of the life of the deceased, as shown by the evidence, without any deduction for necessary or other personal expenses of the deceased, had he lived.' Code, § 4424 (3828). Assuming, then, that an action to recover the value of a life is on trial, and that the Carlisle mortality-table and the annuity-table are in evidence, it would, we think, be proper to give the following instructions, which (for the purpose hereinafter appearing) we will divide, somewhat arbitrarily, into paragraphs, and designate as 'Charge 1':

"(1) In case you should find that the defendant is liable, it will be your duty to determine what amount of damages should be allowed.

"(2) Certain tables are in evidence before you. One of them is the Carlisle mortality-table, and the other is a table showing the value of annuities. We will call the first the "Mortality-Table," and the second the "Annuity-Table." They are not binding upon you, and you are not obliged to use them, or either of them. If you use neither, you need not consider the instructions now about to be given; but as these tables are in evidence, and you have the right to avail yourselves of the assistance to be derived from them, it becomes proper to explain them and inform you in what manner and for what purpose each can be made serviceable. Care, however, must be taken to avoid confusion, and you should be very particular not to use one of them where the other ought to be used. You are also cautioned that you can not advantageously use both in one and the same calculation. While the proper use

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of these tables separately ought to lead to the same result, using them conjunctively or indiscriminately in the same calculation, or without understanding the real purposes they are respectively intended to subserve, will surely lead to error.

“(3) You should ascertain from the evidence the annual earning capacity of the deceased—that is, seek honestly to reach a just conclusion from the facts before you as to what amount should be regarded as fairly representing his yearly income from his own labor to the end of his life, if he had not been killed, and, in so doing, give due weight to the various contingencies which will be pointed out before concluding these instructions. It is proper to remark just here that the age of the deceased at the time of the killing, and his probable expectancy of life, may be considered in arriving at his average yearly earnings, if, in your opinion, in view of all the evidence, his earning capacity would have varied at different periods of his life between the time he was killed and the time he would have died in the course of nature.

“(4) Another and more direct use which you can make of the figures representing such probable expectancy of life will presently be stated. In fixing upon this expectancy, you may consult the mortality-table, which will now be explained. This table is designed to show the expectancy of life which may be entertained by average persons of given ages. The only material information you can derive from it is the time which an average person of equal age with the one under consideration in the present case may be expected to live. This table has two sets of columns, marked, respectively, “Age” and “Expectation Years.” If it should be desired to ascertain how long a person of average health and constitution, aged 33 years, would probably live, you would look for the figures “33” in the “Age” column; and opposite these figures, in the “Expectation Years” column, on the right of the “Age” column, you would find the figures “32.36,” which would indicate that such a person probably had 32 and 36-100 years to live. In the nature of things, there can be no certainty whether any particular individuals will live for a longer or shorter period than the probable expectancy of an average person of his age, as laid down in this table. In estimating the probable length of a given man’s life, as compared with the average duration of life of one of the same age, his health, occupation, habits and surroundings, just as they are disclosed by the evidence, ought to be con-

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sidered, and the proper weight should be given to all of these things in fixing the expectancy of the life, diminishing or increasing the figures laid down in the table according to the facts in the particular case under investigation. The age "33 years" has been selected merely for illustration. You, of course, in using the table, would select the age appropriate to the present case.

"(5) Having, from the evidence, fixed, as accurately and as fairly as you possibly can, upon the number of dollars representing the yearly earnings of the deceased, and having ascertained from the mortality-table, in connection with all the other evidence, his expectancy (that is, the number of years which he would probably have lived), you could, by multiplying one of these numbers by the other, determine approximately what would have been the gross amount of the earnings of his whole lifetime.

"(6) This gross amount, when ascertained, would, of course, have to be reduced to its present value; that is, to a sum which, paid down all at once, would be the just and legal cash equivalent of such gross amount. The present value would necessarily be less than the gross amount, and the longer the life the greater would be the difference in these respective sums. If you pursue the course above indicated, and arrive at the gross amount in the manner which has just been explained to you, it would then be incumbent upon you to make the necessary calculations for ascertaining its present cash value. But, inasmuch as the proper result can be more readily reached by availing yourselves of the work which has been done in compiling the annuity table, you may prefer to resort to it. In that event, you would not find it necessary to arrive at a gross amount, and then reduce it to present value, for the use of the annuity-table enables you to accomplish the same end by a shorter process. The following illustration will aid you in understanding how to use this table:

"(7) Suppose a man thirty-three years old was killed, and at the time of his death was earning \$40 per month, which would make \$480 per year. If it was certain that he would continue to earn this amount every year as long as he lived, his labor would represent a yearly annuity of \$480; and one entitled to recover the value of his life would have the right to receive such an amount as would be the fair cash equivalent of an annuity of \$480, payable in yearly installments during the period the deceased would have lived but for the homicide.

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“(8) To arrive at such an amount in the case supposed, the annuity-table could be made available in the following manner: First, you would look in the column marked “Age” till you found the figures “33.” Opposite these figures you would find, in a column marked “7 Per Cent” (it being on the right of the “Age” column), the figures “11.448.” The meaning is that an annuity of \$1.00 in favor of an average person thirty-three years old, and to continue through life, would, on the seven per cent. basis, be worth, cash down, \$11.448.

“(9) Therefore, multiplying \$480 by the figures “11.448” would give the cash value of a like annuity of \$480, viz.: \$5,495.04.

“(10) This annuity-table can be used for any age up to one hundred and three, and with reference to any sum of money representing or standing in the place of an annuity. The illustration shows you how to use the table, but you must not confuse the figures mentioned in it with the actual figures of the case now on trial. On the contrary, you should be governed as to these matters by the evidence.

“(11) You will observe that the illustration given is based upon the assumption that the deceased would have actually earned \$480 every year during the entire period of his life, if he had not been killed.

“(12) It rarely, if ever, happens that a man labors every day until his death, or receives all the while a fixed and regular income from his labor; nor does his capacity to earn money often remain undiminished to old age. In arriving at the amount to be allowed as damages in any particular case, these things should be carefully borne in mind. The illustration given is also based upon the further assumption that the supposed person was one whose expectancy of life was that of an average man. If, in any case, the expectancy of the person under consideration would, under the evidence, have probably been greater or less than that of the average man, the amount of the damages to be allowed should be increased or diminished accordingly. In applying these instructions to the case which you are now trying, you will, of course, be governed by its facts and circumstances as proved. Feebleness of health, actual sickness, the loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages, the increasing infirmities of age, with a corresponding diminution of earning capacity, and other causes,

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may contribute in greater or less degree to decreasing the gross earnings of a lifetime. In estimating damages, a proper allowance and deduction should be made in favor of the defendant for any diminution in income from labor which would have resulted from any of these sources. The defendant is not responsible for the consequences of the acts of others not its agents, nor for results which would in any event and without reference to the conduct or negligence of the defendant, have come to pass.

“(13) In arriving at the cash value of the life of the deceased and fixing the amount of the damages, you should take all these matters into consideration and give them due weight.

“(14) If the defendant is not liable at all, the instructions which have been given concerning these tables should be disregarded entirely. If liable, and you see proper to use the tables, or either of them, an observance of these instructions will aid you in reaching a proper conclusion as to the amount of damages to be allowed.’

“(NOTE.—If the evidence so warrants, an additional instruction, such as is embraced in the words below quoted, may be added to paragraph 12. But this should not be done unless, in view of all the testimony, the propriety and fairness of such an instruction is manifest: You should also take into consideration, and give the proper effect to any evidence before you, if there be such, tending to show a reasonable prospect of increased earnings on the part of the deceased.)

“When the above-mentioned tables are introduced in evidence upon the trial of an action for personal injuries involving an alleged diminution of the plaintiff’s earning capacity, and there is evidence to warrant a finding that there was such a diminution, and that it will be permanent (that is, last during the plaintiff’s life), the following instructions as to the methods of using the tables may be given. We will designate the same ‘Charge 2’:

“(1) If you find that the defendant is liable, it will be your duty to fix the measure of the plaintiff’s damages. Among other things, he claims that he has been permanently injured, that his capacity to labor and earn money has been decreased, and that this condition will continue to the end of his life. If this contention has not been proved to your satisfaction, you will have no occasion to consult the tables concerning the use of which you will presently be instructed, and should disregard them entirely. But if you find that the defendant is liable, and should believe from the evidence that the plaintiff was capable of earning by his labor so

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much per year, and, because of personal injuries wrongfully inflicted upon him by the defendant, his earning capacity has been materially reduced, and the injuries were of such a permanent and lasting character that this decreased capacity to earn money will continue through life, the following instructions will be pertinent:

“(2) (Same as paragraph 2 of Charge 1).

“(3) You should ascertain from the evidence the annual loss which has been occasioned to the plaintiff by reason of his injuries. To do this, you will have to take into consideration his earning capacity before he was injured, and the per cent. (or ratio) in which that capacity has been diminished. Seek honestly to reach just conclusions from the facts before you as to what amount would have fairly represented the yearly earnings of the plaintiff to the end of his life, had he not been injured, and as to the proportion—whether one-fourth, one-half, or more or less than these fractions—in which such earnings will be reduced because of his injuries. In estimating what would have been the plaintiff's probable earnings through life if his laboring capacity had remained unimpaired, you should give due weight to the various contingencies that will be pointed out to you before concluding these instructions. It is proper to remark just here that the plaintiff's age at the time he was injured, and his then probable expectancy of life, may be considered in arriving at what would have been his average yearly earnings but for the injury, if, in your opinion, in view of all the evidence, his earning capacity would have varied at different periods of his life in case there had been no injury.

“(4) (Same as paragraph 4 of Charge 1).

“(5) Having from the evidence fixed, as accurately and as fairly as you possibly can, upon the number of dollars representing the yearly loss in earnings occasioned to the plaintiff by his injuries, and having ascertained from the mortality-table, in connection with all the other evidence before you, his expectancy (that is, the number of years which, at the time of his injury, he could reasonably have expected to live, you could, by multiplying one of these numbers by the other, determine approximately the gross amount of the loss.

“(6) (Same as paragraph 6 of Charge 1).

“(7) Suppose a man thirty-three years old, and capable of earning \$40 per month, or \$480 per year, was so injured that he could earn only \$20 per month, or \$240 per year, and this decreased capacity to earn money would last during his entire life. If it was

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certain that, but for the injuries, he would have continued to earn the full amount of \$480 every year as long as he lived, his loss on account of the injuries would represent a yearly annuity of \$240; and, if entitled to recover for such loss, his damages, as to this matter, should be such an amount as would be the fair cash equivalent of an annuity of \$240, payable in annual installments, until the end of his life.

“(8) (Same as paragraph 8 of Charge 1).

“(9) Therefore, multiplying \$240 by the figures “11.48” would give the cash value of a like annuity of \$240, viz.: \$2,747.52.

“(10) (Same as paragraph 10 of Charge 1).

“(11) For instance, you will have noticed that the case supposed in the illustration is one where the earning capacity was reduced one-half. It might be that it was reduced two-thirds, or only one-third, or one-fourth, or any other fraction. The true per cent. of the decreased capacity must in each case be ascertained from the evidence, the question being, “In what proportion does it show the ability to earn money has been lessened?” You will also observe that the illustration given rests upon the assumption that the injured person would have actually earned \$480 every year during the entire period of his expectancy, if he had not been hurt, and his consequent loss on account of the decrease in his ability to labor is calculated upon that basis.

“(12) (Same as paragraph 12 of Charge 1).

“(13) In arriving, therefore, at the amount which should be allowed the plaintiff on account of loss arising from diminished ability to labor, you should take all these matters into consideration, and give them due weight.

“(14) (Same as paragraph 14 of Charge 1).

“(NOTE.—In a proper case, the reading of paragraph 12 of Charge 1 as a part of Charge 2 may be followed by giving the additional instruction below quoted. In this connection, however, see note at end of Charge 1: “* * * You should also take into consideration and give the proper effect to, any evidence before you, if there be such, tending to show that there was a reasonable prospect of increased earnings on the part of the plaintiff in case he had not been injured.” Cited, 99/229; 102/296; 104/614; 110/247; 112/621, 915; 128/245.

The word “measure,” as used in the charge in relation to damages, was manifestly, from the context and nature of the expression, meant to be understood as referring to “amount.” 110/247.

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That the jury may clearly understand their duty with respect to reducing to its present cash value the gross amount which they may find to fairly represent the loss in earning capacity which the injured party has sustained, the court, in charging upon this subject, should make choice of language which is not calculated to confuse the jury because of inaccuracy of expression. *Mason*, 123/773. Cited, 4 G. A. 668.

It is not error for the trial judge upon the trial of an action for damages against a railroad company, in illustrating to the jury the method of using the mortality and annuity tables, to use for example a figure approximating that shown by the evidence to be the plaintiff's age. *Duffey*, 116/346.

After instructing the jury that if they believe the plaintiff has sustained permanent injuries, they may use the mortality tables to aid in ascertaining his probable length of life, the court should inform the jury how to estimate the damage after ascertaining the expectancy of the plaintiff. But if general instructions are given on the subject of the ascertainment of damages, more specific instructions on the subject, if desired, should be duly requested. *O'Bryan*, 119/147. Cited, 123/779; 4 G. A. 668.

In a case where they are applicable, we can not hold that the instructions which were formulated in *Burney*, *supra* and which it was suggested might be properly given in connection with mortality and annuity tables, are calculated to confuse the jury. *Scott*, 128/244.

The method of reducing expectant future damages to a present equivalent cash sum should be in accordance with the rule of the forum in which the damages are being estimated and assessed, even though the cause of action be based on a tort committed in another State. *Sasser*, 4 G. A. 276.

619. A consolidated table.

As confusion often occurs in the use made of the tables by juries, when both complete tables are before them, and with a view to simplify their use, the table here given has been prepared. It is a consolidation of the essential portions of the Carlisle mortality and annuity tables.

TABLE

Showing the expectation of life at ages named, and the value of annuities on single lives, according to the Carlisle Mortality and the Annuity Tables:

Age	Expectation Years.	7 per cent.	Age	Expectation Years.	7 per cent.
0	38.72	9,177	52	19.68	9,329
1	44.68	10,605	53	18.97	9,205
2	47.55	11,342	54	18.28	9,011
3	49.82	11,978	55	17.58	8,807
4	50.76	12,322	56	16.89	8,595
5	51.25	12,574	57	16.21	8,375
6	51.17	12,698	58	15.55	8,135
7	50.80	12,756	59	14.92	7,940
8	50.24	12,770	60	14.34	7,743
9	49.57	12,754	61	13.82	7,572
10	48.82	12,717	62	13.31	7,403
11	48.04	12,669	63	12.81	7,229
12	47.27	12,621	64	12.30	7,042
13	46.51	12,572	65	11.79	6,847
14	45.75	12,522	66	11.27	6,641
15	45.00	12,473	67	10.75	6,421
16	44.27	12,429	68	10.23	6,189
17	43.57	12,389	69	9.70	5,945
18	42.87	12,348	70	9.18	5,690
19	42.17	12,305	71	8.65	5,420
20	41.46	12,259	72	8.16	5,162
21	40.75	12,210	73	7.72	4,927
22	40.04	12,156	74	7.33	4,719
23	39.31	12,098	75	7.01	4,549
24	38.59	12,037	76	6.69	4,382
25	37.86	11,972	77	6.40	4,227
26	37.14	11,904	78	6.12	4,067
27	36.41	11,832	79	5.80	3,883
28	35.69	11,759	80	5.51	3,713
29	35.00	11,693	81	5.21	3,523
30	34.34	11,636	82	4.93	3,352
31	33.68	11,578	83	4.65	3,174
32	33.03	11,516	84	4.39	2,999
33	32.36	11,448	85	4.12	2,815
34	31.68	11,374	86	3.90	2,652
35	31.00	11,295	87	3.71	2,519
36	30.32	11,211	88	3.59	2,439
37	29.64	11,124	89	3.47	2,344
38	28.96	11,033	90	3.28	2,198
39	28.28	10,939	91	3.26	2,180
40	27.61	10,845	92	3.37	2,266
41	26.97	10,757	93	3.48	2,376
42	26.34	10,671	94	3.53	2,419
43	25.71	10,585	95	3.53	2,451
44	25.09	10,494	96	3.46	2,420
45	24.46	10,397	97	3.28	2,309
46	23.82	10,292	98	3.07	2,177
47	23.17	10,178	99	2.77	1,964
48	22.50	10,052	100	2.28	1,569
49	21.81	9,908	101	1.79	1,159
50	21.11	9,749	102	1.30	0,735
51	20.39	9,573	103	0.83	0,312

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The table, as thus prepared, shows the expectation of life of a person of any age from one to one hundred and three years, and it also shows the present cash value of an annuity of \$1.00 to continue through life in favor of an average person of a specified age. The figures in the second and third columns; that is, the figures in the column of "Expectation of Years" and those in the column of "7 Per Cent." are never to be multiplied the one with the other. The amount shown by the testimony to be the annual earning capacity, and the figures in the "7 Per Cent." column, opposite the figures representing the age of the deceased in the "Age" column, are to be multiplied together. The testimony in the case, aside from these tables, should show the age of the injured person, and also his annual earning capacity. To illustrate in the simplest manner the use of the tables as here consolidated, we will suppose that the injured person according to the testimony was twenty years old, and his annual earning capacity was \$1.00. Those two items we would get from the proof without going to the tables. We would resort to the tables to find out how the person would probably live, and also to get the present cash value of what he would have earned if he had lived. To get his probable duration of life we turn to the first column of the table, which is the "Age" column, and to the figures "20," that being the age of the person injured. Opposite the figures "20," and in the next column, which is the "Expectation of Years" column, we find the figures 41.16. That would mean that the person had 41.16-100 years to live. To multiply the amount of his earning capacity for one year by the number of years he would probably live, would give the entire amount of the earnings for his whole lifetime, which should be reduced to its present value. The third column of this table is made up from the annuity-table, and it is to be consulted only in reducing the annual income to present value. In the third column of the table, the "7 Per Cent." column, and opposite the figures "20" and "41.16" we find the figures "12,259," which is the present value of an annuity of \$1.00, in favor of a person twenty years old. Inasmuch as in the case supposed the income was \$1.00, "12,259-1000" would be its present value. If the proof showed the annual income to be \$500.00 or other sum, the "12,259" would be multiplied by such sum instead of the \$1.00.

The annuity-table can not be rightly used on a basis of earnings and age, without deducting, first, a due proportion for continuing

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ability to labor; secondly, some amount for probable diminution of ability by old age; and, thirdly, a due proportion for the plaintiff's contributory negligence, if the jury should believe that there was such negligence. *McLeod*, 94/530.

620. Charges that should not be omitted.

In *Mosely*, 112/914, it was held that in charging a jury with respect to the six per cent. and seven per cent. columns in an annuity-table, the judge should direct them to use the latter; and, in giving instructions with regard to using the mortality and annuity tables, he should call their attention to the decreased capacity to earn money which will result from increasing age and the infirmity incident thereto. That instruction is always applicable in suits for damages on account of injuries alleged to be permanent.

In *Austin*, 104/614, it was held that there was no error in giving in charge to the jury the form in relation to the use which may be made by the jury of mortality and annuity tables. Such form is not open to the objection that it contains any expression of opinion as to what has or has not been proved. *Simmons*, C. J., said: "The form of charge suggested is not binding upon the trial judges, but it was very carefully and thoroughly considered by this court before it was adopted and promulgated; and, since these exceptions have been taken to it, we have again carefully considered it, and we can not find, either in the portions to which exception is taken or in any other part of the charge, any expression of opinion as to what has or has not been proved. It is simply an explanation of how and in what manner the tables should be used, if the jury should consider them at all. It appears to us that the judge is bound, when these tables are introduced in evidence, to explain to the jury how they may be used, just as he should explain a table of logarithms if it were introduced in a case involving questions which that table would illustrate. And so he should explain an almanac introduced to show the phases of the moon, or the time of the rising and setting of the sun, etc." Cited, 2 G. A 808.

621. Errors in instructing the jury that did not mislead.

Where there was a verbal inaccuracy in instructing the jury as to the annuity-table on the subject of reducing to present value the probable earnings of the plaintiff, and there is no indication in the

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verdict as compared with the evidence that the jury used either the wrong table or the wrong figures, a new trial will not be granted. *Wiggins*, 91/208. Cited, 2 G. A. 807.

The plaintiff in a case involving permanent injury having introduced in evidence the table of life-expectancy contained in 70 Ga. 844, et seq., but not the annuity table, a portion of the charge, when considered with the entire charge as to damages, did not furnish ground for a new trial as failing to instruct the jury how to use such tables, and therefore being calculated to mislead them to the prejudice of the defendant, which part of the charge was as follows: "The plaintiff has introduced in evidence before you a mortality table which you may consider upon the question of how long you believe the plaintiff would have lived, in awarding damages for a permanent physical injury in this case. You may consider the length of time the plaintiff would have lived, and you may consider also the extent to which his physical power has been impaired or reduced, if any. The value of plaintiff's services, however, up to his twenty-first year could not be allowed by you." *Brook*, 132/858.

The court properly instructed the jury not to consider the Carlisle mortality table, which was in evidence, if they should believe from the evidence that the plaintiff was not entitled to recover, or that his injuries were not permanent. There was no expression of "opinion on the facts" in such charge. *Sanders*, 123/763.

And, although the court may have erred in its explanation to the jury of the mortality and annuity tables introduced in evidence, and the methods of their use, such error would be no cause for a new trial, when it manifestly appears that it in no way misled the jury, or caused them to overvalue the life of the deceased. *Day*, 91/676. Cited, 108/795.

In *Flowers*, 108/795, it was held that some of the instructions given in the present case concerning the annuity-table and the method of using it were inaccurate; but when the amount of the verdict, viewed in the light of all the testimony, is considered, it is manifest that the error committed in this respect could not have resulted injuriously to the defendant, and therefore it affords no ground for setting aside the verdict, which was well warranted by the evidence.

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622. Dangerous custom offered to excuse negligence.

In Mayfield, 87/374, the plaintiff sought to recover damages for an injury sustained while attempting to couple the engine to a car. Plaintiff was introduced as a witness, and was asked: "What was the usual custom in making such couplings of such engines and cars?" It was held that a custom or usage, obviously dangerous, and the facts alleged in the plaintiff's declaration showing that it would be dangerous, is not admissible to excuse contributory negligence by the plaintiff, more especially where it did not appear that such custom or usage had been adopted by the defendant, or that it prevailed at the place or on the particular railway concerned. Simmons, J., said: "It will be observed that the witness was not asked as to the custom of this particular railroad, nor as to the custom of the railroads at the particular place where he was injured, but was asked as to the usual custom of making car-couplings on such engines. We do not think that this was sufficient to bind the company; the custom, if it existed, being obviously dangerous, and the declaration alleging that 'the machinery was defective, in that the foot-board or rim around the pilot, on which plaintiff stepped to make the coupling, was too narrow to make a secure footing at such a point of danger.' As to inadmissibility of usage or custom to excuse negligence, see Deer. Neg. § 9; 107 Mass. 496; 55 Me. 438; 36 Iowa, 32; 5 Hun, 523; 8 Gray, 457; 31 N. W. Rep. 868; 44 N. W. Rep. 1078; 25 N. W. Rep. 104; De Bray, 71/407, and cases cited in Flannagan, *supra*." Cited, 88/11.

623. Common experience and general custom of railroads, when inadmissible.

Upon the trial of an action against a railroad company for a homicide resulting in part from the misplacement of a switch, it was not error to refuse to allow the defendant to show "the common experience of railroads" in getting back switch-keys from their employees, and that all railroads have great difficulty in keeping up with such keys and having them returned by discharged employees because of their real or alleged loss. Nor was there error in refusing to allow defendant to prove "the custom or usage of railroads in reference to providing a watchman for each of their switches," defendant expecting to prove "that the general custom was not to provide a watchman for such switches." Lumpkin, J., said: "Testimony as to the common experience, customs or usages of rail-

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roads, without reference to whether they are wisely or badly managed, or to their particular location or surroundings, or to peculiar circumstances, which, in any given instance, would tend to illustrate the diligence or negligence of a company in recovering or failing to recover its switch-keys, or in guarding or failing to guard its switches, would be too vague, uncertain and indefinite to aid a jury in determining in a case on trial whether or not the railroad company was diligent or negligent in these respects. No two cases are exactly alike, and, the facts and circumstances in each being different in greater or less degree from those arising in others, the better and safer rule is to allow the jury, as to questions of the kind presented, to determine every case upon its own individual merits, and in the light of its own particular facts. In some cases the failure to recover a switch-key or to have a switch guarded might involve little or no negligence whatever. In other cases, such failure might amount to very gross negligence. This being so, to permit evidence as to the common experience and general custom of railroads in such matters would probably be misleading, and certainly would have little weight in a given case in arriving at a fair and just conclusion upon the question of negligence." Kane, 92/187. Cited, 107/76.

The plaintiff, an engineer, was injured in a collision while driving an engine of the defendant company through its yards at night. One of the disputed points was whether or not the plaintiff, at the time of the collision, was displaying the proper signals. Rules of the company relating to "yard" engines were in evidence, but, under the definition of a yard engine therein given, the engine which the plaintiff was operating was not a yard, but a road engine. There was no evidence of any printed rule of the company, of which the plaintiff had notice, prescribing the signals to be displayed by road engines while running through the yards. Held, that it was not error for the court to admit evidence of the custom of engineers of the defendant as to signals displayed by such engines under similar circumstances, or to instruct them with reference to such evidence in the charge. Goodson, 118/833. Cited, 120/515; 119/261; 128/816.

Where suit was brought for the homicide of a workman employed in working on the piers of a bridge where one railroad crossed over another, by reason of being run upon, while temporarily standing on the track, during the passing of a train

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overhead, by a train on the lower road, which was alleged to have been carelessly run at a reckless speed and in violation of a municipal ordinance, there was no error in refusing to permit counsel for defendant to ask a witness introduced by him, "Do you know what the custom is, what the bridge gang does for the protection of approaching trains, when they are working on bridges?" This is true although counsel stated that he desired to have the witness state, "if he knows, the custom in railroad operations, where a bridge gang is at work on a bridge, what they do or are required to do for the protection of approaching trains." Peavler, 134/648.

624. Habit of the company with reference to a stool to aid in alighting.

In Holcombe, 88/9, it was held that where the employee whose business it was to place a stool used for the purpose of assisting lady passengers to enter the train was not produced or accounted for, there was no error in rejecting evidence that it was the custom and habit of the company to have the stool in its proper place up to the time of the starting of the train, there being positive evidence in behalf of the plaintiff that it was out of place when he was injured, and only negative evidence to the contrary in behalf of the defendant. Lumpkin, J., said: "If the servant of the company whose duty it was to look after this stool had been sworn as a witness, and had testified that when the plaintiff fell the stool was where it should be, we think it would have been proper to allow him to strengthen his testimony by stating, if he could, that he knew the stool was in its proper place on this particular occasion because it was his invariable habit and custom to keep it where it belonged, and not to take it up until the train was about to start. No such witness was offered, and defendant's witnesses, who swore concerning the location of the stool, did not positively say it was not on the platform between the cars. Their testimony was, at best, only negative on this point, while the testimony for plaintiff was positive that the stool was on such platform, and that he fell over it. We think that, while a witness may testify to the existence of a custom or habit concerning which he has personal knowledge, and with which he had personal connection, by way of strengthening his statement that this custom or habit was observed on a particular occasion, it would not be proper, as a general rule, to admit independent testimony as to what was or was not the

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habit of a person or corporation with reference to a given subject. 79/387; Mayfield, *supra*. These authorities and the cases therein cited not only sustain the above view, but an examination of them will show that a manifest distinction exists between customs which, by reason of their general operation, have the force and effect of law, and the mere habit of one individual or corporation. Of course, a custom so well known and recognized within the sphere of its operation as to become a part of the law of contracts or other transactions made in a particular locality may be proved by witnesses familiar with the existence of the same; but the rule is different in reference to the particular way or manner in which a single corporation or person transacts a specific kind of business."

In Tucker, 122/387, the plaintiff alleged, that in placing a stool on the ground for the purpose of enabling passengers to disembark, as it was the duty of the conductor to do, he negligently placed the stool partially under the steps of the car, so that when she stepped on the stool, it turned over and caused her to fall. Evans, J., said: "In fact the only charge of negligence which the testimony introduced by her tended to establish was that the stool had not been placed by the conductor in its customary position opposite the car steps, but had been carelessly so placed that it was partly under the steps and therefore did not present a sufficient surface for securing a firm foothold. The court left the jury to determine whether the stool was placed in the usual place, relatively to the car steps, or, as claimed by the plaintiff, partially under them. The charge is criticised 'because it assumes * * * that the usual place where the stool was placed was the proper place, which might or might not be true.' There was no dispute or difference of opinion as to the position in which the stool ought to have been placed, nor was there any contention that the position in which the conductor testified he usually placed the stool was not its proper place; so that the real question for the jury to determine was whether the stool was put in its usual place opposite the car steps, or in an unusual place, viz., partly under the steps."

625. Usual custom of pedestrians in crossing the street in front of dummies.

In Johnson, 91/466, the plaintiff sued for injury caused by a dummy belonging to a street-railroad company. Defendant's engineer was asked: "What is the usual custom of the way passengers

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or pedestrians act toward these dummies—when you are driving down the street; what is the usual custom of people when they undertake to cross the street when dummies are coming along; what has been your observation?” Plaintiff’s counsel objected to the observation of the witness or usual custom; and the objection was sustained as to his observations of the conduct of other people at a previous time. Defendant, in its assignments of error, alleged that the court erred in not allowing the engineer to answer the question, because the jury were to compare Mrs. Johnson’s conduct with that of other people under like circumstances, and it was competent to show how others acted under like circumstances, by any one who had observed such conduct. It was held that, on the trial of an action against a street-railroad company for damages to the plaintiff occasioned by negligent injury to his wife, sustained in consequence of running a dummy against her while she was endeavoring to cross a street in front of a train, it is not competent to prove what was the usual custom of pedestrians when they undertook to cross a street along which cars drawn by dummies were passing. Bleckley, C. J., said: “Their conduct would be no measure of diligence for Mrs. Johnson, because that measure is to be found, not in the conduct of such persons merely as the engineer had observed, but in the conduct of every prudent person who might be placed in like circumstances with those which environed Mrs. Johnson at the time of this occurrence. This standard was not one for proof by witnesses, but was already in the minds of the jurors. They were to compare her conduct with that standard, and not with a standard raised in the mind of the engineer, or which might be raised in their own minds by what he had noticed relatively to the usual conduct of certain unknown and unnamed persons, who may have been more or less diligent than prudent persons generally. Nor was the rejected evidence relevant touching the company’s or the engineer’s negligence, for the engineer was bound to anticipate that Mrs. Johnson would act as a prudent person, according to a legal or jury standard, and not merely according to the usual custom of those pedestrians whom he himself had personally observed. It may be well doubted whether this testimony was not admissible to affect the conduct of the engineer. Of course, it was not admissible to change the degree of diligence required of either party, for that is prescribed by law. But what is proper diligence under the circumstances of

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the case is a question for the jury. This injury occurred on a public street where each party had a right to be. It did not occur on the defendant's right of way, where the plaintiff would have been a trespasser, and the engineer would not have been required to anticipate her presence. It does not appear on what ground the objection to the testimony was based. The assignment of error attempts to support it on the theory that the jury were to compare Mrs. Johnson's conduct with that of other people under like circumstances, and therefore it was competent to show how others acted. Certainly it could not be admitted for that purpose. It will be observed that the question did not relate to any particular persons, but to the usual custom of people—obviously meaning the people generally. The question fairly considered, probably meant this: 'According to your observation, in what way do the people usually act when they attempt to cross the street when dummies are coming along?' The answer would show how the people at large were accustomed to act in the given instance and that the engineer knew about it. Was he not bound to anticipate that Mrs. Johnson might probably act as he knew the people generally did under such circumstances? If he was, the testimony was admissible."

It was not error to admit evidence showing the customary way in which business of the railway company was conducted in the yard where plaintiff was injured, there being in evidence no rule of the company relating to the matter which was the subject of the evidence. Phillips, 117/98.

ORDINANCES.

626. Existence of an ordinance is referred to the jury.

In Smith, 78/694, it was held that the omission of specific acts of diligence prescribed by statute or by a valid municipal ordinance, is negligence per se, and the court may so instruct the jury. In this case the existence of an ordinance was referred, as matter of fact, to the jury. Cited, 93/395; 110/247; 111/17.

In Young, 81/397, it was held that it is negligence as matter of law for railway companies not to use the precautions for safety at public crossings definitely prescribed by statute or valid municipal ordinance. The existence of an ordinance, however, is matter of fact to be referred to the jury; the court can not notice it judicially.

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Such an ordinance, regulating speed of trains and requiring flagmen or watchmen to keep at crowded crossings, may be passed and enforced by a city under the general grant of police powers usually found in municipal charters. No unreasonable ordinance can be valid. Bleckley, C. J., said: "We will add that the style of the charge in this case touching the city ordinances, was too absolute and unconditional, in treating them as law, without any reference to the jury of the question of fact as to whether there were such ordinances before them, and perhaps as to whether they were reasonable. The manner of dealing with the subject in Smith, *supra*, was more satisfactory." Cited, 88/64; 90/507; 111/17; 134/620.

Where, during the progress of the trial, a certified copy of a city ordinance was offered by the plaintiff and properly admitted by the court, and where afterwards, during the progress of the case, the defendant offered evidence which, under the peculiar facts of the case, rendered it a question whether the ordinance had been adopted, and, if so, whether it had been repealed, there was no error on the part of the judge in not then, of his own motion, excluding the certified copy ordinance. And, under the special facts of this case, there was no error injurious to the defendant in submitting the question to the jury. Parker, 127/471.

627. Municipal ordinance, how proved.

Section 5803 (5216) of the Code provides that exemplifications of the records and minutes of municipal corporations of this State, when certified by the clerks or keepers of such records under seal, shall be admitted in evidence under the same rules and regulations as exemplifications of the records of the courts of record of this State.

In Johnson, 90/500, it was held that a municipal ordinance may be proved by the production of the original book of ordinances, identified as such by the clerk of the corporation, and shown to have come from his custody; notwithstanding § 5803 (5216) of the Code makes an official certified copy evidence, it is not the exclusive evidence. Cited, 102/297; 104/12; 134/618.

A book purporting to contain the official minutes of a city council was, in the absence of the clerk of council for providential cause, he being the proper custodian of the minutes and records kept by the council, admissible in evidence upon proof showing

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that the book in question had been brought from the clerk's office by the city treasurer, who was acting in the clerk's place during his absence, and that the official signature of the clerk appeared upon the pages of the book in connection with what purported to be the proceedings of the council. *City of Columbus v. Ogletree*, 102/293. Cited, 104/12.

In *Hix*, 104/11, it was held that an ordinance of a municipal corporation can not be proven by the introduction of a book purporting to contain the published ordinances of the city, upon the parol testimony of a witness that such book was published by authority of the city. *Lewis, J.*, said: "The question presented is whether or not an ordinance of a municipal corporation can be proven by the introduction of a book purporting to contain the published ordinances of a city, upon the parol testimony of a witness that such book was published by authority of the city. From § 5803 (5216) of the Code and the decision in *Johnson's case*, *supra*, it will be seen that there are at least two ways in which a municipal ordinance may be proved: First, by an official certified copy thereof, under seal; or, secondly, by the production of the original book of ordinances, identified as such by the clerk of the corporation, and shown to have come from his custody. The ordinance in the present case was admitted in evidence, over the objection of the defendant, upon the testimony of a witness who swore that the book containing the same was a compilation of the city ordinances of Dalton, published by authority of the city of Dalton as their laws. That the witness stated simply that this book was published 'by authority of the city of Dalton,' would not render it competent evidence. It was not even shown that any municipal ordinance or law was passed authorizing the publication, nor that it was adopted by the proper city authorities as a compilation of its book of ordinances. It was an unauthentic copy, so far as this record discloses, and was purely secondary evidence."

Where city ordinances were codified, and such codification was adopted by an ordinance, and the clerk of the council and keeper of the records copied and certified a section of such codification, and also prepared and certified from the record a copy of the adopting ordinance, this was sufficient to authorize the admission in evidence of the copy of the section of the city code. *Metropolitan Street Railway Co. v. Johnson*, 90 Ga. 500 (16 S. E. 49); *Western & Atlantic R. Co. v. Hix*, 104 Ga. 11 (30 S. E. 424); 8 Enc. Ev. 825, 826. *Peavler*, 134/618.

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In *Bond*, 111/13, it was held that an exemplification of a municipal ordinance is not admissible in evidence unless duly certified under the corporate seal. Lumpkin, P. J., said: "The plaintiff's husband was killed in the town of Montezuma by a locomotive of the defendant company. For the purpose of showing that the train drawn by this locomotive was running at an unlawful rate of speed, the plaintiff offered in evidence what purported to be a certified copy of an ordinance of that town which made it unlawful to 'run engines and trains in any part of the town more than five miles an hour.' This document was objected to on the ground that 'there was no seal of the town attached' to the certificate which purported to be signed by the clerk of council. The objection was overruled. It ought to have been sustained. The paper offered in evidence was not admissible under § 5798 (5211) of the Code, for that section applies exclusively and in terms to the public officers of this State and the several counties thereof, and therefore can have no reference to certificates signed by municipal officers. Indeed, exemplifications of the records of municipal corporations were not admissible at all until made so by the Act of 1891, and it merely provides that they shall be admitted in evidence when certified under seal. The provisions of this act are now embraced in § 5803 (5216) of the Code."

628. The judge should construe an ordinance.

In *City of Columbus v. Ogletree*, 102/293, it was held that the duty of construing a pertinent city ordinance which has been introduced in evidence, and of explaining its meaning to the jury, devolves upon the judge, and a request in effect asking that its construction be submitted to them was properly refused. Cited, 104/12; 7 G. A. 147.

An ordinance limiting the rate of speed in passing over crossings to ten miles an hour, does not imply that this rate is not to be exceeded between the crossings. *Smith*, 78/694.

"The duty of construing a pertinent city ordinance which has been introduced in evidence, and of explaining its meaning to the jury, devolves upon the judge." *City of Columbus v. Ogletree*, 102/293 (29 S. E. 749). And whether an ordinance regulating the speed of trains in a city is reasonable or unreasonable is usually a question for the court. *Central R. Co. v. B. & W. R. Co.*, 87/392 (13 S. E. 520). The ordinance of the City of Thomasville re-

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quiring all railroad trains coming into and going out of the city "to slow down to a speed, after entering the corporate limits of the city, not to exceed ten miles an hour," reasonably construed, means that no train shall exceed that rate of speed when and after it enters the limits of the city; the purpose of the ordinance being to protect person and property within and throughout the entire limits of the city from the danger of fast-running trains. The court in effect so construed the ordinance. *Adams*, 7 G. A. 146.

A town ordinance prohibiting the blocking of street crossings over the tracks of the railroad beyond a specified time is admissible in evidence where it is claimed that a violation of such ordinance, in connection with other acts of negligence, caused the homicide at the place of the killing. *Mouchet*, 3 G. A. 266.

629. Reasonableness or unreasonableness—how determined.

In *Central Railroad Co. v. Brunswick and Western Railroad Co.*, 87/386, it was held that if a city ordinance regulating the speed of trains embrace in its language the whole area of the city, and is reasonable in itself, the court may submit to the jury the question as to whether, on account of the special local conditions and surroundings, it would or would not reasonably apply to the particular locality in question, that locality being just inside of the city limits. *Simmons, J.*, said: "The court left the jury to determine, in view of all the facts and circumstances of the case, whether there was a necessity for the ordinance in this particular locality, and whether or not the operation of it at this place was reasonable. This was a very fair and proper method of disposing of this question. The jury, with all the facts before them, were competent to decide it fairly. The charge submitted to them impartially the contentions of both sides as to the necessity and reasonableness of the ordinance, and they were, perhaps, better qualified to reach a just conclusion on the subject than the judge himself. At any rate, he saw proper to submit this question to them, and we are unable to see that in so doing he committed any error. To justify courts in declaring void an ordinance limiting the speed of trains within a city, its unreasonableness, or want of necessity as a police regulation for the protection of life and property, must be clear, manifest and undoubted. 31 Minn. 402. In the case just cited, the crossing at which a cow was killed was in

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the plat of the city, but the surrounding country was similar to the open country outside of the city, and the street similar to a common country road, there being no graded streets within three-quarters of a mile, and no houses within a quarter of a mile, in the direction of the built-up portion of the city, but the street seems to have been a good deal traveled. Gilfillan, C. J., remarked: 'While it may be true that a higher rate of speed through the portion of the city in question would be consistent with the public safety, we can not say it is so clearly and manifestly the case that we can hold the passage of the ordinance an abuse of discretion on the part of the common council.' The fact that the railroad owned the land on which the injury occurred did not relieve it from the operation of the ordinance. 34 Ind. 397; 88 Mo. 677; 65 Iowa, 658; 38 Hun, 51; Horr & B. Mun. Ord. §§ 239, 145. As to reasonableness of ordinances generally, and rule as to pronouncing void, see Horr. & B. Mun. Ord. § 188 et seq.; 57 Iowa, 555; 19 Amer. & Eng. R. Cas. 83. The rule is laid down in Horr & Bemis, *supra*, that the question whether an ordinance regulating the speed of trains in a city is reasonable or unreasonable and void is for the court. In this case the court ruled that the ordinance was, in itself, valid and reasonable, but held that the application of it to the particular locality in question was reasonable or otherwise according as certain facts were or were not established, and left it to the jury to determine whether or not these facts existed. We think that in thus acting the court disposed of both questions in the proper manner." Cited, 90/507.

In Johnson, 90/500, it was held that the reasonableness or unreasonableness of a city ordinance regulating the speed of a train upon a street is a question of law for the court to decide, and not for the jury, unless it depends, in the opinion of the court, on the existence of particular facts which are disputed. It was error to charge that the reasonableness or unreasonableness of the ordinance was a question for the jury. Simmons, J., said: "Such an ordinance may be reasonable as applied to one locality and unreasonable as applied to another. Although it may be reasonable as to populous parts of a city, it may not be so with reference to uninhabited districts near the corporate limits. If the nature of the locality is a matter of dispute, the court should furnish the jury with the test by which the reasonableness of the ordinance, as applied to the particular locality, is to be determined, instructing

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them as to the conditions under which it would apply and those under which it would not; and it would be for the jury to say whether or not the ordinance was reasonable and applicable, according as they might find these conditions to exist or not. *Central R., etc., Co. v. Brunswick & Western R. Co.*, *supra*, and cases cited; *Horr & B. Mun. Ord.* §§ 239, 145. The expression in *Young*, *supra*, to the effect that the court below ought perhaps to have left it to the jury to say whether the ordinance was reasonable, instead of assuming its legality, and charging them upon that assumption, was merely an incidental suggestion, no direct question having been made which could call for a ruling on this point. In the present case the court charged that it was for the jury to decide upon the validity of the ordinance, yet no issue of fact had arisen which would require the submission to them of the question of its reasonableness or unreasonableness in its application to the locality in which the injury took place. This we hold to be error." Cited, 97/648.

In *Priscock*, 97/643, it was held that the reasonableness or unreasonableness of a city ordinance, with reference to its application to a particular locality, not being involved in the case, and there being no request to charge on this subject, an omission to do so was not error. *Simmons, C. J.*, said: "Besides, it appears from the evidence that the place where the injury occurred was near the center of the city, and in a populous locality, and there could be no question of the reasonableness of the ordinances as applied to that locality."

In *Stafford*, 99/187, it appeared that the accident occurred at a crossing of a public street in the city of Dalton. It was held that, under the evidence in this case, the court did not err in charging that a failure of the defendant's servants to comply with a city ordinance regulating the speed of trains within the corporate limits was negligence, nor in failing to submit to the jury the question whether such ordinance was reasonable or unreasonable, with reference to the locality where the injury was inflicted.

An ordinance granting a franchise to a telephone company to construct and maintain its lines upon the streets and alleys of a city, which provides that wherever it is necessary for the telephone wires to cross any electric-light wire, a space of not less than three feet shall be preserved between the former and the latter, and if it shall be necessary to raise or lower the wires in order to preserve

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the distance, the expense thereof shall be borne by the company doing the latest construction, and proper guards are to be placed and maintained, (assuming its reasonableness) imposes the duty of erecting and maintaining guards upon the company doing the latest construction. Where the undisputed evidence shows that at the point of crossing where the alleged contact of wires occurred, the electric-light company first constructed its wires, the ordinance was not applicable to the electric-light company, and its reasonableness or unreasonableness was not an issuable fact as to it, and the plaintiff has no cause of complaint of the submission of such issue to the jury. *Heidt v. Southern Telephone & Telegraph Co.*, 122/474.

A municipal corporation, under what is commonly called the "general welfare" clause of its charter, may by ordinance make reasonable regulations as to the speed of railroad trains within its limits; and this power is not as matter of law confined to regulating the running of such trains in the streets or public squares of the city or while crossing a street. Where evidence was introduced by a plaintiff to show that a municipal ordinance prohibited railway trains from running faster than a certain specified speed within the corporate limits, it was not admissible for the defendant to show that some months after the injury the ordinance was changed so as to exclude certain portions of the city from its operation. The making of such an amendment did not show that the original ordinance was void for unreasonableness. No exception was taken to the submission to the jury of the question of the reasonableness of the ordinance as applied to the place of the injury, and the charge and refusal to charge on that subject do not require a new trial. *Peavler*, 134/618.

630. Companies and employees must take notice of ordinances.

Railroad companies and their employees using railways in a city must take notice of all valid city ordinances duly promulgated. *Railroad v. Railroad*, 87/386.

It is not competent for any purpose to show that a railroad employee who has violated a municipal ordinance was ignorant of its existence. *Lumpkin, P. J.*, said: "It was insisted in the argument here that testimony upon this line, though not admissible for the purpose of excusing the engineer for a violation of the

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town ordinance, was competent for the purpose of showing that he was not grossly negligent in running the train at a prohibited rate of speed. We can not concur in this view. When a town or city passes an ordinance of this kind, all railroad companies concerned and their agents and servants are chargeable with constructive notice of it, and it can not become material, in any judicial investigation of the question whether or not the ordinance was duly observed upon a particular occasion, to inquire whether the company or its employees had actual notice of the existence of the same or not." Bond, 111/13. Cited, 114/913.

A city ordinance which by its terms manifestly relates exclusively to railroads upon which cars are moved by locomotives propelled by steam, and which regulates the "running speed of trains and engines" within the city limits, has no application to an electric street-railroad, and therefore is irrelevant in a trial of an action against the latter. Hill, 101/66.

In Foster, 108/223, it was held that, in a suit for damages against a street-railway company for personal injuries sustained by the running of its cars on a public crossing in a city where the plaintiff's petition alleges that the defendant's car was at the time of the injury running fifteen miles an hour, which "violated an ordinance of the city of Atlanta which requires the speed of such cars over crossings not to exceed six miles per hour," it was not error for the court to admit in evidence ordinances of the city prescribing that the speed of street-cars, should not be more than six miles an hour at public crossings, and making a violation of the ordinance a penal offense; the only objection made by counsel to the introduction of the ordinances being that the same were not sufficiently pleaded in the plaintiff's petition. Lewis, J., said: "No demurrer was filed to the allegations of the petition in this particular on the ground of a want of sufficient fullness, nor was any objection made that the ordinances referred to were not set forth in the petition nor copies attached as exhibits thereto. If there was any defect in the petition on this account, it was the subject-matter of a special demurrer, and had it been attacked in this way the plaintiff could have readily met the objection by offering a proper amendment. A failure on the part of the defendant below to make its objection in this way amounted to a waiver of its right to have the ordinances in question more fully described or set forth, and we knew of no law which will allow it to assert

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such a right simply by objecting to testimony which clearly tends to sustain the general allegations of the petition."

631. Habitual negligence at particular times and places.

In *Flannagan*, 82/579, it was held that it was not error to receive evidence of doubtful admissibility, and such was the character of the evidence showing the high speed at which the engine which ran over and killed the plaintiff's husband was habitually run by the same engineer at the same place, and that he habitually neglected to ring the bell. *Bleckley*, C. J., said: "This evidence was of doubtful admissibility. The authorities upon the question conflict. Upon so doubtful a question we think the court did not err in admitting the evidence. There are several cases in our reports holding that doubtful evidence is to be admitted rather than excluded." Cited, 92/192; 94/110; 107/76.

In *Kane*, 92/187, it was held that though one of the main issues was whether or not the engineer for whose homicide the action was brought was guilty of negligence in bringing about the collision which resulted in his death, there was no error in refusing to allow the defendant to prove that he "was habitually reckless in running freight-trains at excessive speed, and running too fast over switches," the witness's knowledge not extending to more than two or three instances. *Lumpkin*, J., said: "The admissibility of testimony of this kind is at best very doubtful. While in *Flannagan*, *supra*, this court held that it was not error to receive evidence showing the high speed at which the same engine was habitually run by the same engineer at the same place, and that he habitually neglected to ring the bell, Chief Justice *Bleckley* characterized this evidence as being of doubtful admissibility, and stated that the authorities upon the question were in conflict." Cited, 94/110.

In *Ross*, 107/73, it was held to be error to allow a witness to testify: "They killed a good many stock out in that way—they kill the mules and cows. It has not been a year since they killed a mule right below where they killed mine." And *Little*, J., in speaking of *Flannagan's* case, *supra*, said: "There the testimony was confined to the same engine, run by the same engineer, on the same street; and Chief Justice *Bleckley* cited a large number of cases pro and con. on the admissibility of such evidence when it was confined to the identical place, and the identical locomotive

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operated by the same person. The admissibility of the evidence must have been sustained alone to show the habitual negligence of the particular person who it was claimed was guilty of the particular act. The proposition here, in effect, would be, that all the engines of this company were, by the different engineers, accustomed to kill mules and cows at this place."

632. Habits of injured person.

In a suit against a city for damages, resulting from falling into a hole on a sidewalk, it being in issue whether the plaintiff was under the influence of liquor at the time of the injury or not, there was no error in admitting evidence of repeated drunkenness for some years before the injury and afterwards, the judge having cautioned the jury that, unless the plaintiff was under the effects of liquor on the night of the injury, such testimony could not affect his case. *Enright v. City of Atlanta*, 78/288. Cited, 1 G. A. 396; 5 G. A. 744.

The habit or practice of the plaintiff in departing from cars on other occasions, either before or after the injury complained of, is not admissible testimony for the purpose of illustrating his conduct at the particular time under investigation. *Bates*, 103/233.

The deceased not having been killed while jumping on or off cars, his previous habit of doing so at the public crossing where he was killed is not relevant evidence. *Evans*, 87/673.

While it is error to allow a witness to testify that the "deceased appeared to be a careless man; that was my experience with him," the judgment will not be reversed on that ground, where the record discloses that similar testimony had previously during the trial, without objection thereto, been allowed to be introduced, or where it appears there was proper positive evidence of the same fact. *Daughtry*, 1 G. A. 393.

633. Plaintiff's character for prudence and caution and conductors character.

In *Smith*, 94/107, it was held that on the question whether, in the particular instance, the plaintiff used due care for his own safety, evidence of his character for prudence or recklessness in the conduct of such business is inadmissible, either against him or for him. And *Lumpkin, J.*, said: "One of the contested issues of fact was whether, on the occasion on which he was injured, the

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plaintiff used due care for his own protection and safety. We do not think this question could be elucidated by evidence, one way or the other, as to the general character of the plaintiff for prudence or recklessness. Kane, *supra*, and the authorities there cited, sufficiently sustain the ruling now made. It is true that in one of these cases, Flannagan, *supra*, this court sanctioned the admission of evidence showing the high speed at which the same engine was habitually run by the same engineer at the same place; but Chief Justice Bleckley said it was of doubtful admissibility, and besides there is some difference between proving habitual acts of recklessness or negligence at particular times and places, and proving the general character of a particular person for recklessness, or the contrary." Cited, 103/349; 107/76.

Upon the trial of an action for personal injuries against a railroad company by one of its engineers, after admitting evidence tending to show that such engineer was experienced and reliable, it was error to charge that, as throwing light on the question whether or not he was to blame, the jury might consider his character as an experienced and reliable engineer, if such character had been shown by the testimony, the evidence mentioned not being relevant upon this particular issue. Kent, 87/402.

The suit, Newton, 85/517, was brought to recover damages for the homicide of the plaintiff's husband, and the court permitted a witness to testify that the character of the deceased was that of a prudent and cautious man. This was held to be error. Simmons, J., said: "We think the court erred in admitting this evidence for the purpose for which it seems to have been used by the plaintiff in the court below. One of the theories of the defendant was that the husband of the plaintiff could have avoided this injury by the exercise of ordinary care and diligence at the time he was injured. The question at issue before the jury, therefore, was as to his conduct at that particular time, not as to whether he was a 'prudent and cautious' man ordinarily or not. In the case of *Morris v. Town of East Haven*, 41 Conn. 254, the court said: 'Every case has, of course, its peculiar circumstances, and these must be taken into consideration in determining whether or not in that particular case reasonable care was exercised. Hence what would be reasonable care in one case might fall far short of it in another, and consequently the question whether it was exercised in one case would throw no light upon the question whether it was

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exercised in another. * * * It might as well be proved that a party was negligent on a certain occasion, by showing that he had been negligent on other occasions where other parties had been injured.' In the case of *Chase v. Railroad*, 77 Me. 62, it was held: 'In an action for personal injuries received by a collision at a railroad-crossing, evidence will not be received to show the general character and habits of the traveler for carefulness, as bearing upon the question of due care on his part, though the injuries occasioned death before he could tell how the accident happened, and no one saw him at the time of the collision.' " Cited, 87/408.

In a suit by a passenger to recover damages from a railroad company for the insulting conduct and language of its conductor, testimony as to the general character and reputation of the offending conductor, for polite and courteous treatment of his passengers, is admissible. Hill, C. J., said: "We think that the character of the allegations and the proof made by the plaintiff involved the character of the conductor in his treatment of his passengers, and that for this reason the evidence was admissible. Code, § 5745 (5159). *Enright v. Atlanta*, 78/288 (3); *DuBose v. DuBose*, 75/753; *Christian*, 97/56 (25 S. E. 411). But we do not think the erroneous exclusion of such testimony would in every case be of sufficient gravity to justify a reversal, and probably it would not in the present case." Ransom, 5 G. A. 740. This case again, 8 G. A. 277.

634. Evidence to show recklessness of deceased.

Where the question is in respect to the fault of the husband of plaintiff, for whose homicide she sued, or that of the engineer, warnings of the engineer to the conductor, who was the deceased husband, in regard to his imprudence in transactions similar to that which resulted in his death, are admissible in evidence. It was a circumstance calculated to throw light upon the conduct of the two men and their character. As well the caution of the engineer or his character therefor, as the disregard of warning, and hence the recklessness of the deceased. *Sears*, 59/436.

635. Not competent for plaintiff to testify that he acted cautiously.

That the plaintiff acted cautiously is a conclusion, not a mere fact, and he is not competent to testify in general terms that he so acted. *Mayfield*, 87/374.

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636. Repairs made after the accident.

One issue being whether a cotton-yard was negligently out of repair, there was no error in allowing evidence of repairs which were made at the place where the injury occurred, although made after it happened. Whether they should have been made before or were rendered necessary by the accident was a question for the jury. *Gleason*, 69/200. Cited, 82/589. Overruled, 116/165.

Upon the trial of a suit against a street-railroad company for an injury sustained by careless driving over a sharp curve and sudden elevation, it was competent to show that the defendant had altered the curve since the accident. The alteration was a fact which it was competent for the plaintiff to prove for the consideration of the jury, subject to be explained by the defendant why the alteration was made. *Renz*, 55/126. Cited, 82/589. Overruled, 116/165.

In *Flannagan*, 82/579, it was held that it was admissible to prove that after the homicide, the engines of the company were run more slowly along the street which was the scene of the accident. *Bleckley*, C. J., said: "There is much authority to the contrary (see *Patt. Ry. Accident Law*, 421, 422), but we think consistency with our own decisions requires us to hold that it was admissible to show that, after the accident, the engines of the company ran more slowly at the place of the accident than they did previously. The cause of this change of speed was a question for the jury. *Renz* and *Gleason*, *supra*. The evidence was certainly of very slight value, but its admissibility did not depend upon what it proved, but upon its tendency." Overruled, 116/165.

In *Rogers*, 104/224, a full report of the facts is not made, but it was held that if there was any negligence in the railroad company's permitting timbers to be placed from its track across a ditch for the purpose of facilitating passage over it, such negligence did not contribute to the injury of the plaintiff. It was therefore error for the court to charge that, in arriving at a conclusion whether or not the defendant was negligent, the jury could consider the removal of such timbers by the company after the time of the injury. And *Simmons*, C. J., said: "It appears that two cross-ties had been, prior to the time of the injury to plaintiff, placed across a ditch which ran alongside of the railroad-track for the purpose of facilitating the passage of pedestrians over the ditch to the track and that these timbers were in this position at the time of the injury. Whether they were placed there by the servants of the company

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seems to be in doubt, but it is shown that the servants of the company knew of their presence, and that they were used as a footway. Plaintiff and others frequently used them in crossing the ditch. After the injury to plaintiff, the cross-ties were removed by the company. The evidence does not tend to show that the presence of the timbers contributed to the injury sustained by plaintiff. Under these facts, the court charged the jury that they might consider the removal of the ties by the company in arriving at a conclusion as to whether the company was negligent in the present case. This court has decided in several cases that where injury was inflicted by means of a defect in the track or machinery of a railroad company, and such defect was subsequently removed or repaired by the company, this fact could be considered as in the nature of an admission of negligence by the company. I have always regarded this as a harsh rule, for it may frequently happen that the servants of the corporation may not know of the defect until after it has injured some one. It seems to me to be unjust to charge a person or a corporation with negligence because the defect by means of which the injury was inflicted has been repaired."

In *Cartledge*, 116/164, it was held, that, after an occurrence resulting in injury to one person, another who is sought to be held accountable therefor took additional precautions to prevent others from being likewise injured, can neither justly nor logically be regarded as an admission on his part that he was negligent in not sooner observing such precautions. Prior decisions by this court, virtually to the contrary, reviewed and overruled. See *Renz*, 55/126; *Gleason*, 69/201; *Flannagan*, 82/580, *supra*.

In *Price*, 121/651, *Evans*, J., said: "Complaint is made that the plaintiff was also allowed to show that at the end of a culvert near the coal-chute the company had erected a guard-rail. This evidence was certainly incompetent for the purpose of showing a quasi admission on the part of the company that the erection of guard-rails in such places was a necessary precaution against injury to its employees."

Under the ruling in *Cartledge*, 116/104 (42 S. E. 405, 59 L. R. A. 118), evidence that after the injury to the plaintiff the railroad company caused the pile of slag to be removed, and banisters or railings to be placed on the sides of the embankment, was inadmissible; and correspondingly a paragraph of the plaintiff's petition which alleged such facts should have been stricken on demurrer thereto

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based on the ground that it was irrelevant and immaterial. *Barnwell*, 131/791.

In an action against a railroad company for damages on account of personal injuries sustained by reason of the derailment and overturning of a car which the plaintiff was in, evidence that another car of the defendant was overturned on a near-by but different track, three months prior to the time the plaintiff's injuries were received, was not relevant to prove negligence on the part of the defendant at the time and place alleged in the petition; but in this case it appears that the failure to rule out such evidence worked no harm to the defendant. *Duffey*, 116/346.

637. Others injured at same place in same way.

The basis of the plaintiff's right to recover is negligence, and, whether the system of the defendant in regard to allowing cellars on its sidewalks, in front of business houses, is reasonably calculated to ensure the safety of those who travel on it by day or night, is a question of fact for the jury, and not a question for the court to decide in its charge. In passing upon it, evidence that children, upon different occasions, have previously fallen into such openings was admissible. It bears remotely upon the question and is admissible for what it is worth. *City of Augusta v. Hafers*, 59/151.

When suit was brought against a municipal corporation, for damages incurred by reason of certain roots of a tree having been negligently left projecting above a sidewalk, in which roots the foot of a pedestrian at night was caught, causing her to trip and fall, and injuring her, it was admissible to show by another person that he was tripped and thrown down some days previously by the same roots at the same place. It was a circumstance to show that the sidewalk would occasion falls. In cases of doubt as to the admissibility of evidence, the current of authority in this State is to admit it and leave its weight and effect to be determined by the jury. *Gilmer v. City of Atlanta*, 77/688.

In an action against a railroad company for the negligent killing of a cow, evidence that the company had at different times paid other persons for cattle killed by its trains at the same place was irrelevant and inadmissible. *Walker*, 87/204.

638. Viewing the premises by the jury.

In *Mayor, etc. v. Brown*, 87/596, Lumpkin, J., said: "The jury,

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with the consent of counsel for both sides, were permitted by the court to visit the scene of the accident and make a personal inspection of the same for themselves. We think this was a good practice as it must undoubtedly have materially aided them in arriving at a correct conclusion as to whether the city authorities were negligent or not. In view of the testimony, and of this personal examination by the jury of the open sewer, we can not say they erroneously found that defendant was negligent, or that the court abused its discretion in allowing their verdict to stand." Cited, 97/646.

In *Prisock*, 97/643, it was held that even if it be within the discretion of the trial judge, over objection by either party, to allow the jury, in the trial of an action for damages, to inspect the place where an alleged injury occurred, this court will not reverse his action in refusing so to do when it affirmatively appears that material physical changes had occurred in the character of the premises between the time of the injury and the time of the trial. *Simmons*, C. J., said: "There is some conflict of authority as to whether, in the absence of a statute authorizing a view of the premises by the jury, it is competent for the court to order a view against the objection of a party. See 1 *Thomp. Trials*, § 882; *Springer v. City of Chicago*, 35 *Am. & Eng. Corp. Cas.* 183. In the case of *Mayor, etc. v. Brown*, *supra*, it appeared that the jury were permitted to visit the scene of the injury, and make a personal examination of the premises, and Justice Lumpkin, in referring to this as showing that the jury had a good opportunity for arriving at a correct conclusion as to whether the city authorities were negligent or not, remarked incidentally that it was a good practice; but in that case counsel on both sides consented to the view of the premises by the jury, and no question was made as to the power or duty of the court in such cases. Assuming, however, that it is within the power of the trial judge to allow the jury to inspect the premises, over objection by either party, this court will not reverse his action in refusing to do so, when it affirmatively appears, as it did here, that there have been material changes in the premises between the time of the injury and the time of the trial."

One assignment of error in the motion for a new trial is as follows: "The court erred in refusing, at the request of defendant's counsel, at the conclusion of the evidence in said case, to permit the jury to view the premises under proper precautions, said request

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being made by defendant's counsel, and there being no objection by the plaintiff or her counsel to said request. When said request was made, the court promptly [denied] it, not waiting to hear from plaintiff or her counsel upon the subject. This refusal by the court was error, because it was the only way by which the jury could properly understand and intelligently apply the testimony to the occurrence." If the court in any case of this character is authorized, without the express consent of both parties, or their counsel, to permit the jury to view the premises where the injury or homicide occurred, it is a matter in his discretion, and his refusal to do so will not be adjudged error. *Johnson v. Winship Machine Co.*, 108/554 (33 S. E. 1013); *County of Bibb v. Reese*, 115/346, 349 (41 S. E. 636). *Dukes*, 134/588.

The court erred in not allowing a diagram of the place where the collision occurred to be sent out with the jury; it having been prepared by a civil engineer, who testified to its correctness, and having been admitted in evidence. *Stafford*, 99/187.

639. Defective engine compared with other engines of the same company.

In *Flannagan*, 82/579, the plaintiff's husband was run over and killed by an engine. She alleged that the engine was old and worn out, with the brakes in bad condition, and difficult to stop, and that it was not supplied with proper brakes. A witness was allowed to state that he knew of no engine of defendant, other than the one in question, that had a hand-brake, the objection being that the declaration did not allege negligence in using an engine supplied only with a hand-brake. It was held that the declaration alleging that the locomotive was not supplied with proper brakes, evidence respecting its brakes, as compared with those of other locomotives belonging to the same company, was admissible.

640. Speed of train, what it was just before, not admissible.

Where the speed of a train at the time of a negligent homicide occurring upon a public street was material, evidence to show what the speed was on the company's property just before reaching the street was not irrelevant. *Bleckley*, C. J., said: "The speed of the train in approaching the place of accident, although at the time the speed was noticed by the witness the train was not upon the street,

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but upon the company's property, was not wholly irrelevant. The distance from the scene of the accident was not very considerable, and the engine was then upon the same journey which in its further progress resulted in the homicide. There is some little presumption that the speed of a train, when once shown, continues to be the same, for a short distance at least, until a change of speed appears from the testimony; and we do not know that this presumption is varied by the fact that the train passed in the meantime from the company's property to the street. As trains do not run alone, but have one or more persons upon them, it is generally in the power of the company to show a change of speed, if any in fact took place." Flannagan, 82/579.

641. Length of trains, proof of average length not admissible.

Newson, 62/339, was an action brought to recover damages for the malicious blowing of the whistle of an engine on the railroad when the plaintiff was traveling along the public road with his horse and buggy, thereby causing his horse to run away and injure him. The defendant insisted that the whistle was blown so as to enable its hindmost car on the train to stop opposite the platform at a crossing, for passengers to get off. Thus the length of the train became a material question. The court allowed a witness to state that the average length of defendant's trains at that season of the year was not less than a certain number of cars. The testimony was improper. The question was what was the length of that particular train, and not what was the average length of defendant's trains.

Where the question was whether a train was being run at a negligent or reckless rate of speed and in violation of a municipal ordinance, at the time when it struck a man, it was not competent for the defendant to show that the speed was no greater than that at which other trains on former occasions had passed that point, as a means of negating the charge of negligence. DeBray, 71/406 (14); Peavler, 134/618.

642. Reports of accidents.

In Carlton, 81/531, the plaintiff gave the defendant notice to produce a report which defendant by its rules required its conductor to make as to the circumstances and character of injuries

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caused by operation of its trains, etc. No oath was made as to its materiality, or that it was in defendant's possession, and the court refused to compel its production. Blandford, J., said: "Had the requirements of the statute been complied with, we see no reason why the paper should not have been produced. We do not understand such a paper to be a privileged communication." Cited, 82/473. This was not a decision upon the question of the admissibility of the report. It goes no further than to suggest that the report was not a privileged communication, and, really, even that question was not involved so as to render a decision necessary. 82/473.

In Carroll, 82/452, it was held that reports to the general manager of the company touching the facts, circumstances and results of a railway accident, and who was to blame therefor, made several days after the event, by the superintendent and the conductor, supported by the affidavit of the latter and of several other employees, are not admissible in evidence to affect the company, whether such reports were exacted and made under standing rules requiring the same, or under special orders for the particular occasion, no question of notice to the company being involved in the controversy. Cited, 85/765.

A report made to a railroad company by one of its servants of the facts and circumstances of an injury received by him in its employment, is not admissible in his favor in a suit by him against the company for damages and calls for no response by the company. Howard, 84/711.

In Whitehead, 90/47, the plaintiff sued the railroad company for damages for the homicide of her husband, alleging that he was in the company's employment as a section-hand, and was at work in the discharge of his duty, shoveling dirt in a cut and constructing a drain or ditch at the side of the track, and, while standing at the end of a cross-tie, performing his work, the defendant's construction-train, with no regular schedule, came backing through the cut at about twenty-five miles an hour, and struck her husband on the head, inflicting injuries from which he died; that no signal was given by the engineer at the road-crossing, which was a short distance from the cut, the whistle was not blown or the bell rung, and no signal was given when the train entered the cut, nor before; that the place where the deceased was standing when the car struck him was in a cut and just beyond a sharp curve; and

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that the train had just rounded the curve when he was struck, and had given no signal whatever to warn him, and he was not guilty of any fault or negligence. Over objections, the court admitted the following rules of the defendant: "No. 113. Work-trains will be run as extras under special orders, and will be assigned certain limits." "No. 70. Extra and delayed trains must sound the whistle frequently on approaching curves, and before passing obscure places." "No. 104. When a train is being pushed by an engine (except when shifting and making-up trains in yards), a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger, and immediately signal the engineer." The objections were that this evidence was irrelevant; that there was no allegation predicated upon the violation of these rules, or that would authorize their introduction; and that it was not alleged or shown that the plaintiff's husband knew of their existence or relied on them, nor that he or the road were operating under them. It was held that the rules were relevant to the negligence charged, and there was no error in admitting them.

643. Identifying a broken axle.

Upon an inquiry as to what caused the breaking of a car-axle, which occurred on the railroad of the defendant at a time when a train was wrecked, it was not error to refuse to allow a witness offered by the defendant to describe to the jury an axle which had been brought to him, reputed, but not proved, to have come from the defendant's railroad, and not identified, either as belonging to the defendant, or as the one involved in the inquiry, although the defendant also expected to prove by this witness that the axle he examined "was broken exactly as the other witness saw the axle made by the wreck, after the injury." Defendant's counsel admitted that he could not identify the axle as the one broken at the accident, and for want of identification alone, the evidence was rejected. *Dottenheim*, 92/425.

644. Acceptance of ticket as agent estops denial of agency.

If one, as agent of a railroad company, accepted a free ticket therefrom, and while traveling over the road free of charge, upon leaving the train near a depot, was injured, he would be estopped from denying the existence of his agency. *Henderson*, 69/715; 73/718.

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645. Change of road.

A public road had run for years at a particular place. On the approach of the railroad contractors to the place the road was turned so as to take a different route. They made a cut eight or nine feet deep where the old road was. The new road led around the cut, and crossed the railroad about one hundred feet from the old road. Two small saplings and some brush were placed in the old road as a guide to the new crossing, but they were insufficient to place any one on guard at night. When the new road had been opened a week or two and had been used by the public, the plaintiff reached the place on his way to the city of Atlanta at eight o'clock at night. The night was dark and it was raining. He knew nothing of the railroad-cut being there, until his team stopped and refused to go. He got out of his wagon and went to his lead mule which he found had turned around. It was so dark he could discern nothing but that the mule was in the bushes. He retraced his steps around the wagon to find out what was the matter and fell into the cut, and was seriously injured. The point of the defense was that the road was permanently changed, and that the plaintiff, at the time of the fall, was not in the legal road. The burden of showing that the route of the road had been legally changed was upon the defendant, and that could only be done by the production of the order, or by proof of such long-established usage as to justify a presumption of such order. If the road was changed without authority of law—a trap dug and carelessly left open, to the detriment of those who, by night as well as by day, have a right to pass over the road—it was a gross wrong. A verdict for the plaintiff was sustained. Wood, 48/565.

646. Contract releasing defendant from responsibility.

Wideman, 99/245, was a suit to recover damages for killing mules by a freight-train. The defendant offered in evidence a contract between plaintiff and defendant for the supplying of cross-ties to defendant from April to October, 1893, in which plaintiff released defendant from all responsibility in damages to his stock during the time he was employed and working under this contract. The objection was that the contract showed on its face that it had expired before the cause of action arose; defendant proposing to show that the terms of the contract had been extended by parol,

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and that it was in force at the time of the accident, and related to the locality where the same occurred. The evidence was rejected, and it was held that where the only objection to the admissibility in evidence of a written contract between the plaintiff and the defendant was, in effect, that under the limitation as to time therein expressed it had expired, and was no longer operative as to the matter in controversy between the parties, and the defendant, in whose behalf it was tendered in evidence, offered to prove "that the terms of the contract had been extended by parol" so as to cover and embrace that matter, this objection should not have been sustained without allowing the defendant an opportunity to show that the contract had in fact been so extended, no question under the statute of frauds being involved.

647. Base conduct of the plaintiff.

On the trial of a civil action, at which the plaintiff testifies as a witness in his own behalf, it is competent for the defendant to prove that the plaintiff, in furtherance of this identical cause, and for the purpose of prevailing therein, had been guilty of base, dishonorable or criminal conduct. Evidence of this character is admissible in behalf of the defendant, both, to discredit the plaintiff as a witness, and to throw suspicion upon the justice of his cause of action. Accordingly the defendant in such case may show that at a previous stage of the suit the plaintiff made an affidavit in which he denied the truth of material statements in another affidavit made by an adverse witness, and that the plaintiff afterwards, when testifying in the cause, admitted that his own affidavit, or a part of it, was willfully false. And where both relevant and irrelevant matters are so blended in the two affidavits as to render it necessary that both should be read in full, in order to clearly understand what and how much of the first was denied in the second, and in order to apply the substance of the latter to that of the former, the whole of the two may be offered and received in evidence together; and it will be no legal objection to their admissibility that some of the contents of one or both, taken separately, are not relevant, and, if so taken, would not be admissible. An admission by a party to a cause on trial, made by him while under examination as a witness upon a former trial of the same cause, that he had intentionally sworn falsely in an affidavit intended to be used, and which was actually used, in his behalf in

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resistance to a motion for a new trial, is admissible in evidence against him, as showing an improper and unconscionable effort on his part to interfere with the due course of justice, and also to discredit him as a witness at the trial in which evidence of such admission is offered; and, where the whole of his previous examination relating to this particular matter would better indicate the scope and precise import of the admission in question than would a part only of such examination, the whole is admissible, although some of it, separately considered, may be irrelevant. It is not essential to the admissibility of such affidavit and examination, for the purposes indicated, that they should contain anything in conflict with the testimony of the party at the last or pending trial, in which they are offered in evidence. A party, though introduced as a witness in his own behalf, may, upon cross-examination as to matters not voluntarily testified about on his direct examination, decline to give testimony which would tend to criminate him, or to bring infamy, disgrace, or public contempt upon himself or his family, notwithstanding the fact that at a previous trial of the case he had waived his privilege of remaining silent as to these matters. A waiver of this kind is not binding upon a witness at a trial subsequent to that at which the waiver was made. *Lybrend*, 99/421. Cited, 103/206.

648. Injured person incompetent witness when engineer is dead.

The locomotive-engineer, from whose negligent act the injury complained of was sustained, is an agent of the corporation within the meaning of the statute of October 29, 1889, and, he being dead, the person injured is an incompetent witness to testify in his own behalf to such negligent act, it not appearing that any surviving officer or agent of the corporation was present. *Mayfield*, 87/374.

649. Compelling female witnesses to come into court.

In *Powell*, 77/192, the objection was that as Mrs. Powell, the plaintiff, resided in the county and was not unable to attend, her interrogatories could not be read and it was held that a female witness, though a party to the suit, and residing in the county, is not obliged as a general rule to attend court in order to testify. Doubtless, for special reasons shown to the court, personal at-

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tendance might be required, but the present instance stands on the general rule. Cited, 83/356.

In Denmead, 83/351, it was argued that a colored female witness whose testimony was taken by interrogatories was of such bad character that if she had been subjected to cross-examination before the court and jury, the jury would not have believed her. It was held that she being a female, the plaintiff, under the law, had the right to take her testimony by interrogatories. If the defendant had desired to have her examined before the court and jury, the judge had power to compel her presence, and doubtless would have done so upon proper application and the assignment of sufficient reason for the necessity of her attendance.

In Randall, 85/297, Simmons, J., said: "Complaint is made that the court refused to compel two female witnesses to come into court and testify, or to continue the case in order that their interrogatories might be taken. Under the facts as stated in this ground of the motion, we do not think the court erred either in refusing to compel the two females to attend court, or in refusing to continue the case that their interrogatories might be taken. It was not shown to the court, in a proper manner, what the witnesses would testify, or the materiality of that testimony. This not being done, the court was right in refusing to compel the witness to attend, and in refusing to continue the case. We do not agree with the court, however, in the reason assigned by him for not compelling the attendance of the witnesses. We think every court, in the furtherance of justice, has a right to compel any witness within its jurisdiction to attend court, and testify. In the case of female witnesses, we think that some good reason should be shown to the court why it is necessary for the females to attend in person, what they will testify, and the materiality of their testimony. If upon this showing the court is satisfied that it is necessary, in the furtherance of justice, for the female witnesses to attend court, he should issue an order requiring them to attend and testify in the case. The statute does not exempt females from attendance upon court. It simply permits their interrogatories to be taken. But, while this is true, this provision of the statute should be followed, unless it is shown to the court that it is necessary to have the personal attendance of the witnesses."

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650. Rule of railroad commission as to interstate passage.

The rule of the railroad commission of this State fixing train rates of fare is admissible in evidence on the trial of a case involving a controversy as to what amount a conductor was entitled to demand from a passenger without a valid ticket for transporting him from a station outside of this State to a station within the same. *Coyle*, 112/121.

651. Agent is a competent witness.

The agent is a competent witness either for or against his principal. His interest goes to his credit. The declarations of the agent as to the business transacted by him are not admissible against his principal, unless they were a part of the negotiation, and constituting the *res gestæ*, or else the agent be dead. Code, § 3606 (3034).

In *Smith v. Bibb Mfg. Co.*, 112/680, the plaintiff sued for damages sustained by reason of the homicide of her son. Cobb, J., said: "It is alleged that the court erred in excluding the following testimony of a witness for the plaintiff—'That he heard Dennis say that he had not been in the employ of defendant but a few days before Tommie Smith was killed, and did not know what the rules of the mill and duties of an alley boy were.' It was admitted that Dennis was dead, and there was evidence tending to show that he was a general boss in the mill. It is contended that the court erred in rejecting the evidence, because the same was admissible as the declarations of a deceased agent, and tended to show negligence on the part of the defendants, in that their agent failed to exercise proper supervision over the deceased, and tended to show that Dennis had put the deceased to a different work from that for which he was hired. It is unnecessary to decide in the present case whether such a declaration as that sought to be introduced is admissible under the provisions of § 3606 (3034) of the Code, which declares, 'The declarations of the agent as to the business transacted by him are not admissible against his principal, unless they were a part of the negotiation, and constituting the *res gestæ*, or else the agent be dead.' Even if such a declaration would ordinarily be admissible, there was no error in rejecting the testimony in the present case, for the reason that there was no allegation that the defendants were negligent in the employment of

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their servants who had control over the deceased." And it was held that in the trial of a suit brought by a mother against a master for the homicide of her son, where there was no allegation in the plaintiff's petition that the defendant was negligent in the employment of the servants who had control over the deceased, it was not error to reject the declaration of one of such servants, since deceased, that he had been in the employment of the defendant for only a short time, and did not know what were the duties of the son.

The agent of a corporation is not, in a case to which it is a party, incompetent to testify as a witness in its behalf concerning communications had between himself, as such agent, and another person, since deceased, whose legal representative is the other party to the case. Holston, 116/656.

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652. Kinds of damages.

Damages may be either general or special, direct or consequential. Code, § 4506 (3909).

General damages; special damages. "General" damages are such as the law presumes to flow from any tortious act, and may be recovered without proof of any amount. "Special" damages are such as actually flowed from the act, and must be proved in order to be recovered. Code, § 4507 (3910).

In *County of Bibb v. Ham*, 110/340, Simmons, C. J., said: "Under the definition of general damages in § 4507 (3910) of the Code the law infers bodily pain and suffering from personal injury and loss of time from the disabling effect thereof. 1 *Suth. Dam.* (2d ed.) § 421. The present suit was for pain and suffering and loss of time resulting from the personal injury to the plaintiff. She also sued for injuries which had disabled or affected her permanently, and as to such injuries it has been held that 'the future effect of the injuries is not special damages which must be alleged, but general damages, which necessarily flow from injuries received.' *Bradbury v. Benton*, 69 Me. 194, 199. Certainly a part, if not all, of the plaintiff's claims came within the class 'general damages,' which are said to include 'not only the direct expenses incurred by the plaintiff, but the loss of his time, the bodily suffering endured, and any incurable hurt inflicted; for these may be classed among necessary results.' *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533. See, also, *Hopkins v. Railroad*, 36 N. H. 9, 72 Am. Dec. 287."

In a suit where the plaintiff was injured by reason of the negligent and unlawful leaving of obstructions upon the sidewalk of a city, it was competent for her to testify that after the injury she had no means of living, and was compelled to sell her house and lot to raise money for that purpose, in consequence of the injury received. It was one of the immediate consequences of the injury, and was not irrelevant in the ascertainment of general damages resulting directly from the wrong of which she was the victim. *Wilson & Brother v. White*, 71/506. Cited, 87/167. The soundness of this decision may well be doubted. Doubtful, 113/215.

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653. Judge must give the jury the rule for estimating the damages claimed.

In an action against a railroad company, where several different elements of damages are claimed, it is error requiring the granting of a new trial for the judge to fail, in his charge to the jury, to give them any rule for estimating the damages claimed; and this is true notwithstanding there was no written request made by the defendant for such charge. *O'Bryan*, 112/127.

In *Vining*, 120/511, *Cobb, J.*, said: "The judge in effect tells the jury that any amount which shall be given to the plaintiff as damages for her lost time is to be determined by the enlightened consciences of the jurors. More than this, he tells them in terms that whatever amount they assess 'in this case' in favor of the plaintiff must 'be such an amount as is dictated by the enlightened consciences of impartial jurors.' * * * Looking to the petition, we find that the plaintiff claimed damages not only for pain and suffering and for being disabled from attending to a business which she was carrying on, but she alleged that as a result of her injuries her capacity to labor was entirely destroyed. She claimed damages, therefore, of a threefold nature, pain and suffering, lost time, and diminution in capacity to labor. When we look to the evidence, it appears that there was nothing upon which a finding for lost time could be properly based, nor was there any evidence upon which a finding for diminished capacity to labor could be properly based. The effect of the judge's charge, therefore, was to remit to the broad field of the enlightened consciences of impartial jurors the determination of two elements of damage that the law requires should be measured by more certain standards." It was held that the charge in reference to the measure of damages was erroneous, and the error was of such a character as to require a reversal of the judgment. Cited, 125/462; 130/698.

It is not good practice to omit entirely to give the jury any instruction on the subject of the measure of damages, or the diminution of damages which may result from negligence on the part of the person injured, even in the absence of requests therefor. *Mad-den*, 135/205.

654. General rule.

Damages are given as compensation for the injury done, and generally this is the measure where the injury is of a character

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capable of being estimated in money. If the injury be small, or the mitigating circumstances be strong, nominal damages only are given. Code, § 4502 (3905).

Smith v. Overby, 30/248, was an action brought against a physician to recover damages for neglect and want of care and skill in delivering plaintiff's wife of a child, and Lumpkin, J., said: "We apprehend that in most of the cases, when carefully examined, it will be found, that whether the injury be done to person or estate, the measure of damage is after all, the actual injury inflicted, neither more nor less."

In an action for a personal injury of a permanent character, where the plaintiff is entitled to recover full damages, one element, if sued for and if the evidence authorizes it, is a fair and reasonable compensation for the loss of what he would otherwise have earned in his trade or profession. As to the element of damages which includes pain and suffering, a reasonable sum is recoverable, to be determined by the jury. *Southern Cotton Oil Co. v. Skipper*, 125/348.

INTEREST AS DAMAGES.

655. Where property is injured or destroyed.

Unliquidated damages arising *ex delicto* do not bear interest, and in such cases the finding of interest as such by the jury is not legal. The jury may add to the value of the property injured a sum equal to the interest on such value and return the whole in one sum as damages. In *Hall, et al.*, 124/322, it was held that where a suit is brought for damages arising from the destruction of property, and there is a basis of calculation as to the value, interest is not recoverable *eo nomine*. But the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may in their discretion increase the amount of damages by adding to the value of the property destroyed a sum equal to the interest on such value, the entire sum found being returned as damages, and not exceeding the amount sued for. Lumpkin, J., said: "The headnote sufficiently states our ruling on the subject of adding interest to the value of the property destroyed. *McCauley*, 68/818; *Sears*, 66/499; *Brown*, 162/13. Where the damages found are discretionary or punitive, this rule does not apply. *Young*, 81/397. *Ratteree v. Chapman*, 79/574."

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The court properly instructed the jury that they might, in assessing the aggregate of damages awarded to the plaintiff for the negligent destruction of his property by fire, include interest upon the value of the property so destroyed, from the date of the fire to the date of the trial, at seven per cent. per annum. *Butler*, 4 G. A. 191 (60 S. E. 1087). See *Wilson v. Troy*, 135 N. Y. 96 (32 N. E. 44, and notes thereto as reported in 18 L. R. A. 449, and 31 Am. St. R. 817). See also *King v. So. Pac. Co.*, 109 Cal. 96 (41 Pac. 786, 29 L. R. A. 755). *Wheeler*, 6 G. A. 270.

656. Illustrations of the rule.

McCauley, 68/818, was a suit for killing a bull, and it was held that in fixing the amount of damages in a suit for destroying property, interest is not recoverable *eo nomine*, but the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may, in their discretion, increase the amount of the damages allowed accordingly. Cited, 81/414; 102/15; 104/386.

In an action against a railroad company for killing mules the whole of the amount awarded by the verdict is damages, although it may include interest added by the jury to the value of the mules. And if the amount thus found is in excess of the amount claimed in the declaration, there being no amendment to cover the excess, the verdict is illegal and should be set aside unless the court, being otherwise satisfied with the verdict, orders the excess to be written off. *Simmons, J.*, said: "The amount of damages claimed in the declaration is the limit of the plaintiff's recovery, and where the verdict is rendered for a greater sum, the court should set it aside unless the plaintiff amends his declaration to cover the excess. In this case there was no amendment, and no offer to amend, either before or after the verdict, to cover this excess of damages; nor did the court require the plaintiff to write off the excess, as he should have done if he was otherwise satisfied with the verdict." *Crawley*, 87/191. Cited, 88/67; 102/15; 104/386; 115/743.

In *Palmer*, 89/161, the action was for tort—killing cattle—and the jury found interest. Direction was given that it be remitted and written off, as the finding of interest, as such, was illegal.

The case *Brown*, 102/13, was to recover damages for killing a jennet. The verdict was for \$100 principal and \$8.16 2-3 interest. It was held that as matter of law, unliquidated demands, arising

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ex delicto, do not bear interest, and on a suit to recover the value of property which has been injured or destroyed the jury can not legally find a given amount for principal, with an additional amount as interest. The jury may in the lawful exercise of their power, add to the value of property destroyed a sum equal to the interest on such value; but such sum must be found and returned as damages, not as interest. Little, J., said: "Our Code, § 4396 (3800) provides that 'in all cases where an amount ascertained would be the damages at the time of the breach, it may be increased by the addition of legal interest from that time till the recovery.' This provision applies in a suit for damages for breach of contract, but in cases arising *ex delicto* for the value of property destroyed, where the measure of damage is the value of the property, the same reasoning would apply the same rule. McCauley, *supra*; Sears, *infra*; Crawley, *supra*. It is understood of course, that the interest found, if any, can not be returned as interest, because it is not interest; the action is one to recover damages, and the item of interest, at the legal worth of money from the time the property was destroyed, may, in the discretion of the jury, be added to the value of the property destroyed in ascertaining and returning an amount sufficient to compensate the plaintiff for the injury sustained. The cases of Young, *infra*, and Ratteree *v.* Chapman, *infra*, are not in conflict with this ruling. In the former case it was ruled that interest can not be added by the jury in their discretion to discretionary damages awarded by them for a personal injury, and, in the latter case, that it may not be added where punitive damages can be allowed. These cases stand for themselves, unaffected by the ruling in this, which goes only to the extent that under our law the jury may, in the lawful exercise of their power, add to the value of property destroyed a sum equal to the interest on such value; not that they must, but may, in the exercise of their judgment and discretion." Cited, 124/338.

657. Subject continued.

In the trial of a case brought to recover damages for killing a horse, it was error for the judge to charge the jury that, after ascertaining the market value of the horse killed, they should add interest from the "time of the judgment of the court below" to the time of the verdict. The verdict in the present case having been returned for a given amount, with interest from a certain date,

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and the evidence being sufficient to authorize the finding, so far as the value of the animal was concerned, and the sum so found being the full amount sued for, direction is given that the part of the verdict and judgment finding interest be written off. Cobb, J., said: "As the evidence was sufficient to authorize the jury to find the value of the animal to be the amount returned in the verdict as principal, this error will not necessitate a new trial; but the amount found as interest must be written off. Especially would this be true in the present case, where the amount found was the full sum sued for; and even, if interest had been properly returned, it would have been necessary to write it off in any event. Crawley, *supra*. Direction is therefore given that the judgment be affirmed as to the amount described in the verdict as principal, and that the verdict and judgment be so amended as to strike therefrom so much as relates to the subject of interest, allowing the judgment to stand for the sum of \$75." Calhoun, 104/384.

Sums ascertainable only by the enlightened conscience of jurors do not bear interest before verdict, either as interest or as damages, with or without discretionary allowance by the jury. Young, 81/397. Cited, 102/15; 111/17; 124/338; 128/248; 132/77.

In Garr, 57/277, Jackson, J., in treating of the question whether the verdict was against the evidence, said: "The evidence, we think, averaging it, and allowing interest to be added as part of the damages, may sustain it." It was a suit by a widow to recover for the homicide of her husband, and no question as to the allowance of interest was made in the case. Cited, 81/414.

Sears, 66/499, was also a suit by a widow for the homicide of her husband, and it was held to be error to instruct the jury, as matter of law, that they should add interest to whatever amount of damages they might find at the date of the homicide, the question of increasing damages in such a case being for the jury. Simmons, J., said: "Until the jury has passed upon the issue, the amount to which she is entitled, if anything, remains unliquidated, and does not bear interest. We do not say that the jury, in reaching the amount of damages, when they have first determined under the law and the evidence that she is entitled to recover, would not be authorized to consider the length of time from the homicide to the trial, the character of the injury, the conduct of the defendant's agents, and all other circumstances connected with the injury, in order to arrive at the proper amount of damages." Cited, 68/818; 81/414; 102/15; 104/386.

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The case *Ratteree v. Chapman*, 79/574, was brought to recover damages for assault and battery, and the court instructed the jury that, if they saw proper, "they might allow interest on the sum awarded at seven per cent. per annum from the time of the injury to the present." This was held to be error and in the opinion it is said: "In a case of tort, when the law allows the recovery of exemplary damages, the allowance of which and the amount thereof being entirely in the discretion of the jury, we do not think that the law contemplates or will allow interest to be computed on the sum awarded by them." Cited, 81/414; 85/496; 102/15; 124/338.

Young, 81/397, was a suit by a child nine years of age, for damages for personal injuries. The court charged to the effect that the jury might, in their discretion, award damages in the nature of interest computed at seven per cent. from the date of the injury to the time of the trial. It was held that this was error; that interest at the legal rate can not be added by the jury in their discretion to discretionary damages awarded by them for a personal injury, and that only special damages computable upon direct or indirect evidence of actual values can be thus increased. Bleckley, C. J., after citing the cases of *Garr*, *Sears*, and *McCauley*, *supra*, says: "In all these cases the damages recoverable were special, and had to be proved by evidence applying directly or indirectly to values; whilst in the present case there is no such evidence, and the entire recovery is for damages of a nature incapable of any standard of measurement external to the minds and consciences of the jury. In this respect, though they are not punitive, all claim to punitive damages having been recovered at the trial, they are as indefinite and indeterminate in their elements as are damages of that class. Consequently the case of *Ratteree v. Chapman*, *supra*, which holds that the jury should not be instructed that they are authorized to add interest in assessing damages, where punitive damages can be allowed, rules this case. If the time of realizing discretionary damages is to be considered (and doubtless the jury may consider it), it should be left as one of the terms of the general problem of damages, unfixed like all the rest of the terms. The rate of interest as established by law has no relevancy to the matter. Sums ascertainable only by the enlightened conscience of impartial jurors do not bear interest before verdict, either as interest or as damages, with or without discretionary allowance by the jury." Cited, 102/15; 124/338.

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PHYSICAL PAIN AND MENTAL DISTRESS.

658. Physical pain and suffering.

In Mullins, 30/146, the plaintiff proved the nature and extent of his injuries. There was no other proof as to the damages. Pain and suffering were not mentioned. The defendant requested the court to charge that before plaintiff could recover, it was necessary for him to prove some pecuniary damages. The request was refused, and the judge charged that it was not necessary to prove any specific pecuniary damages, but that they could find such damages as under all the circumstances of the case, and the nature and extent of the injuries, they thought he was entitled to. It was ruled that the charge was right, and that pecuniary injury is not the only one for which compensation ought to be allowed in damages. Cited, 51/646; 88/764.

In Drysdale, 51/644, it was determined that pain and bodily suffering, resulting from a tort to the person, might be considered by the jury in estimating damages, and it was said that the question was settled in the Mullins case, *supra*. Cited, 128/328.

659. Future pain.

Suit being brought for a permanent injury resulting from a railroad accident, future pain and suffering may form an element in estimating damages, provided the evidence renders it reasonably certain that they will necessarily result from the injury. Johnson, 66/259. And, in a proper case, it is not error to charge that the plaintiff is entitled to recover for the pain and suffering he will probably endure in the future. Mabry, 91/781.

In determining whether a plaintiff is entitled to recover for future pain and suffering, and the amount of such recovery, it is proper for the jury to ascertain, from the evidence, whether the injury which occasioned the suffering is permanent or merely temporary. Wright, 6 G. A. 172.

An allegation in a petition, that the plaintiff "has suffered and will continue to suffer great pain," is sufficient to authorize the admission of evidence that mental pain has been suffered; and when such evidence is admitted, there is no error in charging the jury that in assessing the damages they may take into consideration the mental pain suffered by the plaintiff. Miller, 120/453.

Where a declaration seeking to recover damages for a personal

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injury alleged, that by reason thereof the plaintiff "has been disfigured for life, and has been injured permanently, has entirely lost his left foot and part of his left leg," that his earning capacity has been reduced three fourths; that "besides all these great injuries petitioner has suffered terrible bodily pains and excruciating mental anguish by reason of the injury complained of;" and that "by reason of these injuries petitioner has been damaged to the amount of \$10,000;" and where evidence was introduced as to the loss of the limb and the suffering resulting therefrom, continuing at the time of the trial, a charge as to future pain and suffering was not erroneous on the ground that the petition did not claim damages for such future pain and suffering. *Jacobs*, 88/647. Where by reason of an injury the plaintiff lost his leg, and more than two years thereafter, at the trial, testified that he had suffered great pain, and still suffered, there was sufficient evidence to authorize a charge as to future pain and suffering. *Streyer*, 123/279; *O'Neill Mfg. Co. v. Pruitt*, 110/579; *Clariday*, 124/958. *Southern Cotton Oil Co.*, 125/368.

In *Hill*, 125/354, it was held that, there was evidence to warrant an instruction that if plaintiff were entitled to recover at all, he might recover for future probable pain and reduced capacity to labor. *Fish, C. J.*, said: "The court instructed the jury that if, under the law and the facts, they were of opinion that plaintiff should recover, 'then you will ascertain as best you can from the evidence whether or not the injury is likely, or probably will last for some time to come, and if so, how long, and what will be, if anything, [plaintiff's] reduced capacity to labor for the time the injury will last.' Error was assigned on this and several other instructions of similar import, upon the ground that they authorized the jury to find damages for permanent injuries, when there was no evidence of permanent injuries. Plaintiff testified that he was injured June 10, 1903. The trial occurred during the April term, 1905, and he then testified: 'Since the accident I am hurting all the time except when I am in bed, straightened out. I have just a dead, aching misery in my side. At times it seems like my hip is all right, but if I start out and walk any distance or exert myself in any way, my hip gives out and I can hardly get along; this condition was not there before I was hurt; before I was hurt I could do work, but now I don't do any hard work. I do some light work on the farm. Haven't done a hard day's work since it happened,

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because I am not able to do it.' 'I can't do half as much work now as I could before the accident.' The court nowhere in the charge used the words 'permanent injuries.' We are of opinion that from the evidence as to the character of plaintiff's injuries, and the length of time—nearly two years—he had continued to suffer therefrom, the jury was authorized to infer that his reduced capacity to labor and his pain would probably continue for some time in the future; and hence the assignments of error on the instructions on that subject were not well taken. *Southern Cotton Oil Co. v. Skipper*, post, 369, and cit."

660. Mental suffering of survivors not considered.

In an action to recover damages for a homicide, the jury can not take into consideration the mental sufferings occasioned to survivors by the death. *Paulk*, 24/356. And when the widow sues, grief and anguish can not come in for compensation. *Killian*, 79/234; *Chapman v. Tel. Co.*, 88/770.

661. Mental suffering.

In the case of *Mullins*, 30/146, the plaintiff was injured in a collision of trains. The judge had refused to charge that some pecuniary injuries must be proven, and in the opinion, *Stephens, J.*, said: "Surely there ought to be some compensation for the suffering endured. The pain from the wounds must have been great, and the dread of the approaching collision between the two engines, though brief, must have been terrible. Mental agony has been known to turn a head gray in a night, and gray hairs are often but the effervescence of some great mental anguish. Shall all compensation be denied to such suffering merely because there can be no adequate compensation? We think not."

In *Smith*, 83/674, *Bleckley, C. J.*, said: "In collision cases on railways, the emotional element is a powerful factor; it enters both into the question of liability and the measure of compensation." Then, after quoting the extract which is given above from the *Mullins* case, he adds: "Questions involving deep emotions, and conduct dependent thereon, are generally not mere questions of law, or such as can be disposed of by the logic of the bench. They can best be determined by practical jurors on a view of all the facts and circumstances bearing on the issue."

Where the declaration did not complain of mental suffering, it

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would have been better for the court to have said nothing about it in the charge, yet, where it was alleged that the plaintiff was, by the injury he had received, deformed, this deformity must of necessity have produced not only physical pain, but mental anguish, and a reference to mental suffering was not reversible error. *Lanier*, 83/593.

Evidence that the plaintiff was made nervous and had to go to bed and send for a physician on account of alleged mistreatment is admissible under an allegation that mental pain was caused by such mistreatment. The evidence tends to prove the allegation. *Hill*, C. J., said: "Mental pain and nervousness, if not the same physical ailments, are so closely akin that it would be splitting hairs to attempt differentiation." *Ransom*, 5 G. A. 740.

In *Western Union Telegraph Company v. Ford*, 8 G. A. 514, it was held that while damages for mental and physical suffering alone, disconnected from any physical injury or pecuniary loss, can not be recovered from a telegraph company for negligence in failing to transmit and deliver a telegraphic message with due diligence, yet the company is liable for any physical or bodily injury or pecuniary loss, directly traceable to its negligent conduct as the proximate result thereof; and mental and physical suffering resulting from the bodily injury may be considered as an element of damages. Under the allegations of the petition in this case, it was a question of fact, for the jury to determine, whether the negligent failure of the telegraph company to transmit and deliver a telegram to the physician, whereby he was prevented from earlier attendance and earlier medical or surgical treatment, was the proximate cause of the loss of the plaintiff's eye. *Hill*, C. J., said: "The decisions of this country are in hopeless conflict on the right to recover damages for mental and physical suffering independent of any physical injury or pecuniary loss. Many courts hold that such damages are recoverable, and many hold exactly the reverse. The rule as declared by the Supreme Court of this State in *Chapman v. Telegraph Co.*, 88/763 (15 S. E. 901, 17 L. R. A. 430, 30 Am. St. R. 183), and in *Seifert v. Telegraph Co.*, 129/181 (58 S. E. 699, 11 L. R. A. (N. S.) 1149, 121 Am. St. R. 210), is that mental anguish and physical pain resulting from mere negligence, unaccompanied by any injury to the person or pecuniary loss, can not be made the basis of an action for damages. This seems to be the general rule of the courts in England. See *Lynch v. Knight*, 9 H. L. Cas. 577; *Hobbs*

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v. London & S. W. R. Co., L. R. 10 Q. B. 123. Both the Chapman case and the Seifert case were suits to recover damages against the telegraph company for negligent delay in failing to transmit and deliver messages, and the damages claimed were confined to those arising from mental and physical suffering independently of any physical injury or pecuniary loss. In both these cases the rule is qualified by the limitation that the damages not recoverable are those from pain and suffering alone, disconnected from any physical injury or pecuniary loss. It is distinctly stated in the Chapman case especially that where there is a physical or bodily injury or pecuniary loss resulting from negligent conduct, accompanied by mental and physical suffering, damages are recoverable, and that the suffering flowing from the physical injury, and which is simply the effect thereof, may be considered as an element of damages. It is insisted that this is true only when the damages result from the wrongful commission of an 'affirmative or active tort.' Cases are cited in which the Supreme Court allowed the recovery of damages for wounded feelings, mental and physical, based upon overt acts of physical injuries, and the effort is to restrict the right to recover damages to torts of this character. The decisions make no such restriction, and neither logically nor legally can such a limitation be sustained. Certainly the Chapman and Seifert cases, the leading cases cited, do not make this restriction, and this court will not extend by liberal construction the rule announced in those cases. Whatever may be the difference of opinion as to the right to recover damages for mere mental anguish or physical pain, it is universally conceded that this right is given in every case where, in addition to the mental and physical suffering, there is also an injury to the body, from which the suffering results; and where this tangible effect of a tort exists, the intangible or sentimental result of suffering, either mental or physical, enters into the question of damages as a component part. Nor does it make the slightest legal difference whether the bodily injury is inflicted by an act of commission, or proximately results from negligent conduct. *Sappington, 127/179 (56 S. E. 311).*"

662. Loss of ability to labor causing mental distress.

In *Powell, 77/192*, a suit by a married woman, it was held that where there is evidence tending to show that the state of impaired health and diminished ability to labor, attributable to the injury, may

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endure through life, the mortuary tables are admissible in evidence to aid the jury in dealing with the element of time involved in their computation of the damages. Bleckley, C. J., said: "There was such evidence in this case, and the tables were therefore relevant. One who is to live long in pain is more damaged than one who has to endure suffering but for a brief time. Test this by applying it to two cases, and contrasting them—the first in which pain is to last only for a day, and the second for twenty years. It may be thought that the loss of ability to labor is not pain, but this is a mistake. There is no greater blessing to life than ability to labor, even though the proceeds may belong to another. It is better for happiness, as well as for virtue, to work for nothing than to be idle. A physical injury that destroys the power of a human being to labor is one of the most serious injuries that it is possible to inflict. True, it is not to be measured by pecuniary earnings where the suit is by a married woman, for such earnings, as a general rule, belong to the husband, and the right of action for their loss is in him; but the wife herself has such an interest in her working capacity as that she can recover something for its destruction; and what she is to be allowed ought to be more or less, according to the length of time during which her privation is to continue. Such privation may well be classed with pain and suffering, especially where it involves the breaking up of established habits. To man or woman accustomed to work, enforced idleness is torture." Cited, 85/487; 88/652; 90/508; 111/479.

In Jacobs, 88/647, it was held that it is not an error to describe as pain and suffering a loss of capacity to labor occasioned by a physical injury, nor is it error to call attention to it separately, after instructing the jury touching other pain and suffering. And Bleckley, C. J., said: "It seems to us that the loss or material impairment of any power or faculty is matter for compensation, irrespective of any fruits, pecuniary or otherwise, which the exercise of the power or faculty might produce; and irrespective, also, of any conscious pain or suffering which the loss or impairment might occasion. Every person is entitled to retain and enjoy each and every power of body and mind with which he or she has been endowed, and no one, without being answerable in damages, can wrongfully deprive another, by a physical injury, of any such power or faculty, or materially impair the same. That such deprivation or impairment can be classed with pain and suffering was ruled by this court

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in Powell, *supra*; and, inasmuch as enforced idleness or diminished efficiency in offices of labor is calculated to give rise to mental distress, it is not error to describe the thing by its effects, and call it pain and suffering. But it need not be so called necessarily, and consequently it was not misleading for the court to treat of it separately as a subject-matter for compensation in damages, although the plaintiff was a married woman. Touching this element of her case, the measure of damages would be neither more nor less than that which the law recognizes for pain and suffering. There is no standard but the enlightened conscience of impartial jurors." Cited, 90/508; 107/73. In this latter case it was held that it was not error for the trial judge to charge the jury: "You have the right to give damages for that mental suffering which a man may have from the consciousness that his earning capacity is injured for life. That is one element of damage." Simonsohn, 107/70. Cited, 133/235.

In an action to recover damages for a physical injury, it was competent for a witness who knew the injured person well and who saw him frequently both before and after its occurrence to testify that "He was more stupid after the injury than before. * * * As to his appearance or his manner, I could hardly say except in a general way, except that he was more stupid after than before." Gilleland, 133/621.

Where suit was brought by a man for a personal injury, and after his death pending the action his administratrix was made a party, and on the trial it was shown that before the injury the decedent was a strong and vigorous man, and that after it he lost time from his work and at night was restless and did not sleep well, there was no error in permitting his wife to testify that "his restlessness and sleeplessness were indicated to her by his being restless and twisting around, and he would get up sooner than usual," and that "I noticed when he got up he would place his hand on his hip and stand for a moment before he would start to walk off." Such evidence was not objectionable on the ground of being hearsay. Gilleland, 133/621.

663. Evidence admitted to show general nature of pain and suffering.

In *Jordan v. Southern Bell Telephone Co.*, 87/69, the plaintiff sued for damages because of the falling of a telephone-pole upon him. The court allowed a physician to state that "the pain suffered

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by the plaintiff would perhaps be from some injury to the muscles at the time the injury was inflicted." It was objected to on the ground that there was no allegation in the declaration under which it would be admissible, there being nothing alleged as to any injury to the muscles. Simmons, J., said: "The declaration alleges 'that the pole fell with great force, striking the plaintiff on the left shoulder and the collar-bone, breaking the bones thereof, and felling him to the rock pavement.' We think this allegation is sufficient to authorize proof of pain in the muscles, without alleging specifically that the muscles were lacerated and injured. We can not see how the collar-bone could have been broken by the falling of the pole upon it, without injuring the muscles of the shoulder."

Although the declaration did not specifically allege any injuries to the sexual organs of the plaintiff, there was no error in allowing the plaintiff to testify to such injuries; it appearing that her evidence as to the same was admitted solely for the purpose of throwing light on the general nature of her injuries and her pain and suffering, and that the jury was instructed not to consider the same for any other purpose. *Southern Bell Tel. Co. v. Lynch*, 95/529.

The pain actually suffered was the same, no matter who paid the physician's bill; and therefore the fact that it was paid by the defendant had no relevancy upon this particular question. *Reynolds*, 99/639.

664. Abortion, pain and sorrow resulting from.

In *Liddell*, 85/482, Simmons, J., said: "The court permitted a witness to testify that the plaintiff's nervous prostration had a weakening effect upon her system; that this injury had required the administration of opiates, and that the plaintiff was acquiring the opium habit as a result of this trouble by reason of the administration of opiates; that the plaintiff had great pleasure in her household duties, but she does not take that pleasure now, and she never will; and that from the effects of this nervous prostration she has not got the energy to work or to enjoy society, etc. Judging from the charge of the court, which is in the record, this evidence, and some other of like character, was admitted, not as an element of damage, but somewhat in the nature of an index to the pain and suffering of the plaintiff. Being admitted for that purpose, we can not say it was error."

If a person is injured by the negligence of a railroad company, the

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extent of the injury is a proper subject-matter of inquiry. How she was hurt, whether she had a miscarriage or abortion in consequence of the injury, and whether she suffered great pain in consequence thereof, may all be inquired into, and are not consequences too remote to authorize a recovery. *Randall*, 79/304.

In *Randall*, 85/297, the court charged the jury that "any pain and suffering or sorrow resulting from the miscarriage, the law says is an element of damage." *Simmons*, J., said: "We would suggest that the word 'sorrow' be omitted from the charge of the court on the next trial. It is most too remote to be considered an element of damage, unless it is that sorrow which accompanies the actual injury, and is suffered at the time of the miscarriage. The loss of a child by a miscarriage would affect women so differently that it would be hard for men, sitting as jurors, to estimate it as an element of damage; and we therefore think it would be better to omit, in the future, any instruction to the jury upon the question of sorrow as an element of damage. Pain and suffering give a wide latitude to juries, and there are very few complaints made of the smallness of the amounts found by juries upon these two elements of damage. Upon the question of sorrow being an element of damage, see 5 *Amer. & Eng. Enc. Law*, 42; *Bovee v. Danville*, 53 *Vt.* 190."

665. Injury to pride of manhood.

In *Wood*, 48/565, the plaintiff's right thigh was broken and his right leg was rendered by the injury three inches and three-quarters shorter than the left. The judge charged the jury that the plaintiff might be entitled to recover compensation for his bodily and mental suffering, and for the injury to his pride—his manhood. This language was the subject of criticism. The court held that the measure of damages was the actual injury sustained, which might include bodily and mental suffering; that whilst the expression, "his pride—his manhood," was not strictly accurate, yet as the proof showed that the plaintiff was permanently deformed by being lamed for life, the jury might well have understood the court as referring by his words to this deformity, and that as the verdict was not excessive, it would not be disturbed. *McCay*, J., said: "We do not wholly approve the language used by the judge in his enumeration to the jury of the elements which go to make up the damages. The physical injuries of the plaintiff, and his mental

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and physical suffering are proper elements. But when the judge added, "pride, manhood," we fear he used language calculated in its ordinary signification to open the door too widely. The injury to the pride, manhood of the plaintiff, depends so entirely upon the character and temper of the plaintiff that it can hardly be said to be the direct result of defendant's act. It is a possible result, but other contingent circumstances preponderate in making any estimate upon it. But this charge can only have been understood by the jury in view of the facts, as relating to that injury, which came to the plaintiff by reason of his deformity—the mortification which it put upon him from having to pass through life deformed, lame, shorn of his full proportions as a man. And this was not an improper element in the damages. In this sense, this is only another way of saying that the plaintiff is entitled to damages for having been rendered deformed by the defendant's negligence. We do not see that the jury could have considered any such fanciful damages as depend only on the temperament of the plaintiff."

666. The guide in measuring such damages.

It is left to the jury to decide, according to their own enlightened consciences, what damage ought to be given for pain and wounded feelings, and things of that sort—that is to say, the damage for such hurt is to be fixed by their opinion of the nature of the pain, bodily and mental, according to their consciences, enlightened by the facts of the case. Kelley, 58/107. Cited, 88/755. It is proper, if the testimony so authorizes, for the jury to allow the plaintiff compensation for the pain and suffering occasioned him, and the enlightened consciences of an impartial jury is the only guide by which the measure of such damages can be ascertained. Abbott, 74/851.

The court instructed the jury as follows: "The plaintiff alleges and asks for damages for pain and suffering. In determining the question as to whether you will allow damages for pain and suffering, the court can give you no rule. There is no rule except the enlightened conscience of intelligent, honest jurors." Considered alone this instruction would be error, but, in connection with the entire charge, it is clear that the court in this excerpt was referring to the measure of damages for pain and suffering, and not to plaintiff's right to recover damages for pain and suffering. Goodwyn, 2 G. A. 470.

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It was error for the court to instruct the jury that they should add whatever amount the plaintiff "would be entitled to for pain and suffering to such sum as they might find he is entitled to for damages," inasmuch as pain and suffering in themselves constitute an element of the damages which plaintiff was entitled to recover. But the error was not hurtful to the defendant, as it is clear, upon considering the entire charge, that by the use of the word "damages" the court meant and intended the jury to understand such damages as resulted from impaired or diminished earning capacity. Joyner, 129/683.

PERMANENT INJURIES.**667. No fixed rule for estimating damages for permanent injuries.**

In Freeman, 83/583, the court charged the jury as follows: "The plaintiff says that he has been permanently injured, and that by reason thereof his ability to labor and earn money has been impaired. If this be true, and the jury believe that he is entitled to recover on the case made, he would be entitled to further compensation on this account. The burden is on the plaintiff to show the fact that his capacity to labor and earn money has been permanently impaired, and the extent of such impairment, or to furnish data to the jury, from which they may be able to ascertain his financial loss in this respect. In passing upon this question, you would ascertain from the evidence whether the plaintiff's capacity to labor and earn money is impaired by his injuries, and, if so, the extent of such impairment, and whether such impairment will extend into the future, and through the remainder of his life; and, if you so find, you would award him such a sum as you think reasonable and just, in view of the nature and extent of such injury, and in view of all the facts and circumstances in the case, as disclosed to you in the evidence. If you believe from the evidence that plaintiff has not suffered any permanent injury as a result of the injuries mentioned in the evidence, you would not allow him anything for permanent injury. No fixed rule exists for estimating this sort of damage. The plaintiff's age, his habits, his strength, sex, vocation, rate of wages earned in the past by his labor, his prospect of obtaining steady and remunerative employment in the future, and the like, in so far as they may be illustrated by the

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evidence, are all circumstances proper to be taken into account. Diminution of his ability to work, if likely to occur by growing years and infirmities of age, is also to be considered, and any other fact which this evidence discloses that, in the minds of the jury, ought to affect this particular plaintiff." The error assigned on this charge was, because the amount of damages to be found for a permanent injury is governed by fixed rules as distinguished from the amount allowed for pain and suffering, which is left to the conscience of the jury; the actual financial loss must be given. It was held that the charge was not erroneous. Blandford, J., said: "We have carefully considered the charge complained of; the main complaint being that the court stated that there is no fixed rule for estimating damages of this sort. While there may be a fixed rule as to the compensation which one may be entitled to, there certainly can be no fixed rule by which the jury must be governed in estimating the damages; and we think that what the court said was eminently correct." Cited, 86/145, 148.

In Allison, 86/145, the charge given to the jury in Freeman's case was again under review and it was held that no fixed rule exists for estimating the amount of damages from permanent injuries to the person. The amount should be reasonable and just to both parties, and should compensate the injured one for the loss of money which he would probably earn had not the injuries occurred. Simmons, J., said: "In the nature of things it is impossible for a court to prescribe any fixed rule for estimating the amount of damages from permanent injuries to the person, because it is impossible to prove such exact data as would authorize a court to prescribe one. It is impossible for any witness to testify to the exact time that the injured person would have lived, if he had not been injured. It is impossible to say whether the person would have remained in good health during his whole life, or whether he would have lost little or much time by sickness or idleness or the loss of an opportunity to labor. It is impossible to say whether he would have continued to earn the same amount of money during his whole life; whether he would have earned more, and how much more, or less, and how much less; whether he would have remained in the same occupation, or would have abandoned that, and pursued another more lucrative, or less so. Unless these and other facts which might be enumerated could be shown the jury, we do not see how a fixed rule to measure the damages

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for a permanent injury could be prescribed to the jury. It may be said, however, that the life-tables put in evidence would show a man's expectancy of life, and that the amount he was earning at the time he was injured would be a sufficient basis upon which to prescribe such a rule; but we do not think that this would in all cases be fair, either to the plaintiff or to the railroad company. If the plaintiff were a young man of character and capacity and industry, and had chosen his occupation, and commenced its pursuit, his yearly income at first might be small, but, in a few years, he might be able to increase it very largely; yet, under the rule contended for, he would be confined during his life to the small income he was making at the commencement. On the other hand, if the plaintiff were an aged or a middle-aged person, making a large yearly income, it would be unfair to the railroad company to take that income and his expectancy of life as the sole basis to determine the amount of his recovery; because our experience shows that a man in declining years has not ordinarily the same capacity to labor and earn money as a young man. It is then that sickness, inability, and indisposition to labor come upon him more and more each year, as he grows older. These and like facts should then be taken into consideration by the jury in behalf of the railroad company. None of these things can be proved with such exactness as would authorize a court to prescribe a fixed rule. As was said by the Supreme Court of the United States, in *Railroad Co. v. Putnam*, 118 U. S. 554, 9 Sup. Ct. Rep. 1: 'It has never been held that the rules to be derived from such tables of computations must be the absolute guides of the judgment and the conscience of the jury. On the contrary, in the important and much-considered case of *Phillips v. Railway*, above cited (4 Q. B. Div. 406, 5 Q. B. Div. 78, 5 C. P. Div. 280, and 49 Law J. Q. B. 233), the judges strongly approved the usual practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it was liable; and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof.' We therefore think that it is better for both parties to let the jury look at these things as a whole, in the light of common sense and their own experience, and let them make such a compensation in their verdict

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as would be reasonable and just to both parties, not giving to the plaintiff a large sum with the purpose of enriching him, but compensating him for the loss of money which he would probably earn had he not been injured, and thereby prevented by the negligence of the defendant. These remarks, of course, apply only to the measure of damage for the permanent injury. It is not contended that any fixed rule can be prescribed as a measure of damages for pain and suffering. We therefore reaffirm the ruling in *Freeman, supra*. On this subject, see 2 *Thomp. Trials*, §§ 2077, 2078; 2 *Redf. R. R.* 309 et seq.; 2 *Wood, Ry. Law*, § 317; *Whit. Smith, Neg.* 474; *Pierce, R. R.* 301; 3 *Suth. Dam.* 283 et seq.; 2 *Shear. & R. Neg.* § 758; *Wood's Mayne, Dam.* p. 596, § 627; 2 *Sedg. Dam.* 547; *Pol. Torts*, 161, 162; *Field, Dam.* §§ 614, 615." Cited, 89/569; 112/926; 128/246; 2 *G. A.* 810.

The suit being by an infant child for damages from wounds and bruises that were cured in a few months, and from the loss of sense of hearing alleged to have been a consequence of the injury, a charge on the measure of damages in the terms following was substantially correct: "There is no known rule of law by which witnesses can give you the amount in dollars and cents as the amount of injury, but this is left to the enlightened conscience of an impartial jury. This does not mean that juries can arbitrarily enrich one party at the expense of the other, nor that they should act unreasonably through mere caprice. But it authorizes you to give reasonable damages where the proof shows that the law authorizes it. But the jury should exercise common sense and love of justice, and, from a desire to do right, fix an amount that will fairly compensate for the injury received." *Davis*, 60/329. Cited, 81/419; 85/528; 122/86; 132/862.

In a suit to recover damages for a physical injury causing partial loss of eyesight, nervousness, and inability to follow the previous vocation of the plaintiff, it was inapt to charge the jury that "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases no measure of damages can be prescribed except the enlightened conscience of impartial jurors." While damages on account of pain and suffering are to be measured by the enlightened conscience of impartial jurors, the charge above quoted was not strictly applicable to the case at bar, which involved physical injury. *Davis*, 132/812.

The jury were authorized to infer that the plaintiff's injuries

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would be permanent, from the character of her suffering, and the length of time that it had continued up to the date of the trial; and hence it was not error to charge on the subject of permanent injuries. This is so though there was no direct and positive evidence that her injuries were in fact of a permanent character. *Streyer*, 123/279. Cited, 124/960; 7 G. A. 659.

668. Medical evidence of condition after suit brought and before.

In *Powell*, 77/192, a suit by a married woman, it was held that medical evidence of the condition of the injured party after the suit was brought, as well as before, is admissible to show the nature and effects of the injury, and whether temporary or permanent. If the injury resulted in abortion, evidence touching the consequences of abortion upon the mother's future health is evidence relating to the past injury, and not to future injuries. A question put to a medical witness thus: "How would those troubles affect the nervous system?" does not inquire for dicta or opinions of the profession at large, but for the individual opinion of the physician under examination. And, though not confined to the nervous system of this particular woman, the question is relevant as an inquiry concerning a pathological law to which her system, as being that of a woman, is or may be subject. Cited, 85/482.

669. Loss of capacity shown by exhibition of the injured hand.

In *Pruitt*, 110/577, the plaintiff, a child of thirteen years of age, had his hand injured in the defendant's shop. On the trial he exhibited his hand to the jury. The four fingers and part of the thumb had been cut off. It was shown that his capacity to labor at the kind of employment in which he had been engaged was entirely gone. The report of the case does not show what the charge was that was excepted to, but it appears to have been upon the subject of the diminution of the plaintiff's earning capacity. *Simmons*, C. J., said: "Complaint is made of the instructions of the court to the jury as to the manner of using the mortality and annuity tables which had been introduced in evidence. It is contended that while the charge, abstractly considered, was correct, there was no evidence upon which to predicate it; that there was no evidence that the plaintiff's earning capacity had been diminished in whole or in

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part. There was evidence to show that he was totally incapacitated to continue his work on the machines in the defendant's shop, or to work on similar machines. Further than this, the plaintiff exhibited his hand to the jury, showing the loss of the four fingers and a portion of the thumb. The jury saw his injured hand, and could, in our opinion, have inferred a partial loss of capacity from its condition, and determined for themselves the extent to which the boy's capacity to labor, then or in the future, was diminished. Had a witness been examined upon this subject, and given his opinion, this opinion must necessarily have been based upon the loss of the hand; and we see no reason why the jury could not form an opinion upon the same fact. The injury was not latent or concealed, but was patent." Cited, 125/368.

Where a plaintiff had suffered the loss of both legs by reason of a personal injury on a railroad, and testified, on the trial of a suit because of it, that he could walk a little on his knees and that he also used a rolling-chair, there was no error in permitting him to walk before the jury and exhibit to them the loss of his limbs and the effect thereof on his ability to walk. Brock, 132/858.

670. Previous ill health aggravated by the injury.

Bray et ux. v. Latham, 81/640, was an action by a tenant and his wife against their landlord, and was based upon an alleged arson, committed by the defendant, when overinsured upon the premises and upon a storehouse adjoining, with a stock of goods therein, the imputed motive of the burning being to destroy the property and collect the insurance. The fire occurred shortly after midnight, in winter weather, and consumed both buildings. The wife, it was alleged, barely escaped with life; suffered from fright, exertion, and exposure; caught cold in the night-air, while trying, without clothes, to save the lives of her children; fainted and was unconscious; was confined to her bed for weeks; the fright and exertion brought on prolapsus uteri from which she still suffers. The court charged the jury, "If you believe from the evidence that the plaintiff, prior to the fire, was not in good health, but was afflicted with falling or displacement of the womb, to the extent that such sickness or disorder contributed to her unsound condition after the fire, she could not recover. She could only recover for such injuries as you believe followed upon the fire," etc. Bleckley, C. J., said: "Putting the jury to consider how much pre-

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vious ill health may have contributed to subsequent ill health seems too much like treating the former as contributory wrong, whereas previous ill health should be considered as a state calling for more forbearance on the part of a wrong-doer than a state of robust health. The invalid is not less, but more sacred, especially against assault by midnight fire, than a person free from infirmity. Where the subject of a tort is already diseased, the question should be how much, if any, the tort contributed to aggravate or protract the disorder. There is not to be an apportionment of damages, as in cases of contributory or comparative negligence, although the damages are to be adjusted to the agency of the defendant in making the bad health worse or more lasting. If this defendant did either by the alleged tort, he is liable. A tort to health already impaired can not be redressed except by giving damages for any further impairment, and for any obstruction occasioned by the tort to recovery from existing maladies. To cause sickness wrongfully, or to aggravate or protract it, is an injury to health for which damages are recoverable." Cited, 88/771.

"Good health" is a relative term, and does not mean absolute freedom from physical infirmity, but only such a condition of body and mind as that one may discharge the ordinary duties of life without serious strain upon the vital powers. It follows from the foregoing that when, in a suit by a female against a railroad company for damages for personal injuries, it is alleged that the plaintiff was, prior to the injuries, "in good health," a recovery may be had notwithstanding it appears from the evidence that at the time of the injuries the plaintiff was laboring under an infirmity of which she was ignorant, and which did not interfere with the discharge by her of the ordinary duties of life, and that the result of the negligence of the railroad company was, not to produce an infirmity, but simply to aggravate the existing infirmity. Douglas, 119/658.

671. Law does not contemplate absolute compensation for loss of limb.

In *Young*, 81/397, it was held that for a personal injury to a child nine years of age, including deprivation of a member, the law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case. Among the results of the injury to be consid-

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ered are pain and suffering, disfigurement and mutilation of the person, and impaired capacity to pursue the ordinary avocation of life at and after attainment of majority. And when this case was again before the court, it was held that the law does not contemplate absolute, but only a qualified or relative, compensation in damages for personal injuries resulting in the loss of a limb, there being no money equivalent for such injuries. *Young*, 83/512. Cited, 85/528.

On the trial of an action brought by a minor for permanent personal injuries, when no evidence was submitted in reference to the earning capacity of the plaintiff prior to the injuries, there was no measure of damages for such injuries except the enlightened consciences of impartial jurors, guided by the facts and circumstances of the particular case. A charge to this effect was not inapplicable in the present case. *Gardner*, 122/82.

672. When jury should not be instructed to consider prospect of increased earnings.

In *Jackson*, 112/620, it was held that a charge instructing a jury to take into consideration a plaintiff's "prospects of increased earnings" should not, when there is no evidence to warrant it, be given. *Lumpkin*, P. J., said: "The petition alleged nothing as to any prospect of increased earnings on the part of the plaintiff, and a diligent study of the brief of evidence fails to disclose that there was any testimony even remotely tending to show that he had such prospects. We are, therefore, of the opinion that the charge above quoted ought not to have been given. While undertaking, in the case of *Burney*, to formulate instructions which might be appropriately given in connection with the mortality and annuity tables, we took especial pains to state precisely when a charge with respect to increased earning capacity would be authorized, viz., when 'the evidence so warrants.' See page 11, 98 Ga. We added that 'this should not be done unless, in view of all the testimony, the propriety and fairness of such an instruction is manifest.'" See 619. Cited, 128/245; 130/699; 2 G. A. 809.

In *Schaufele*, 6 G. A. '660, it was held that the court may, in a proper case, instruct the jury that in determining the extent of the plaintiff's personal injuries, they may take into consideration any evidence tending to show that there would have been a reasonable prospect of an increase of his earnings from what they were at the time of the injury. The evidence examined and held to justify

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the charge in the present case. Powell, J., said: "The plaintiff testified, that at the time of the injury he was working as a 'follow' switchman, having been engaged in this service but one day; that he had had considerable previous experience in railroad work; that at the time of his injury he was getting \$1.98 per day; that he had worked for the Southern Railway as a seal clerk in the Augusta yard office at \$50 per month; that he was promoted to the position of yard conductor at \$82 per month, and left this employment because 'work got slack,' and he, being the newest man, was turned off. He was educated in the public schools of Richmond county. He was 23 years old at the time of his injury. He had previously served in the positions of brakeman, flagman, seal clerk, and yard conductor; in the last mentioned capacity he had been employed by the defendant company previously in the same year, though he seemed to have served only intermittently in this capacity during this employment. Considering the plaintiff's age, his education, the experience he had had, the fact that he had previously achieved promotions and had been temporarily 'demoted' (as he claimed and testified) only because of the condition of the times, and further, that he was at the time of the injury just entering upon a new employment in a position lower than those he had previously filled, we can not say that there was no evidence of prospects that his earnings would increase."

A charge instructing a jury to take into consideration and give the proper effect to any evidence before them, if there be such, tending to show that there was a reasonable prospect of increased earnings on the part of the plaintiff in case he had not been injured, should not be given, where there is no evidence to warrant it. Scott, 128/244. Cited, 130/699; 2 G. A. 809. In Wright, 130/969, the foregoing head note is repeated, and Lumpkin, J., said: "If the rule of stare decisis has any force, this is not an open question while the decisions referred to (Burney, Jackson, Scott, supra) stand." Cited, 6 G. A. 661.

673. Recovery for diminished capacity to labor without proof of value of earnings.

In *City Council of Augusta v. Owens*, 111/464, it was held that a person whose capacity to labor has been permanently diminished by physical injury wrongfully inflicted upon him by another can recover damages therefor, notwithstanding there may have been no

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proof as to what such person's earnings were before or after the injury. Hence there was no error, in the light of the pleadings and the evidence in this case, for the court to charge the jury on the subject of the right of plaintiff to recover for his decreased capacity to work, if the jury found from the evidence that the injury received was permanent. Lewis, J., said: "The objection to this was that there was no evidence showing how much he had been earning at the time of the trial, nor was there any evidence to show that his ability to labor had been diminished. The plaintiff testified that his capacity to labor was diminished, that it pained him to work in the sun, and that, while he did labor after the injury, he had to do so to support his family, but that it was attended with pain. There was also evidence for defendant tending to show the character of service and labor that he performed after his injury, and it seemed about as hard and difficult as he did before he was hurt. It is true, there is no evidence as to his earnings before or after the injury. This charge we do not think authorizes the jury to have any reference to his diminished earnings, but it has reference only to his diminished ability to labor. But there is authority for the position that such permanent diminution of one's power to labor constitutes an element of damages, where it is the result of an injury sustained, though there may be no evidence that it had any effect upon the earnings of the injured party. See Powell, *supra*, where the principle is laid down that one who has to live long in pain is more damaged than one who has to endure suffering but for a brief term."

If a person's capacity to labor was permanently diminished by a physical injury wrongfully inflicted upon him by another, such permanent diminution of capacity to labor was for the consideration of the jury in determining the amount of the recovery, notwithstanding there may have been no proof showing a diminution of earnings or loss of time after the injury, and the pecuniary value thereof. If it be sought to recover because of a decreased ability to earn money, or because of a loss of time, entailing pecuniary loss, there must be some proof as to such diminished earnings or earning capacity or the value of such lost time, in order to authorize a submission to the jury of the question of such pecuniary loss. But permanent diminution of capacity to labor is for the consideration of the jury, along with such elements of damage as pain, suffering, disfigurement, or the like, if proved, in determining the amount of damages to be awarded. Haralson, 133/231.

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An employee of a railroad company who has been injured by its negligence, without fault on his part, may recover general damages on account of pain, physical injury and general depreciation of power to labor, although no proof of the value of his services as such employee, or in other business, may be made. If it were necessary to allege the value of services of a person injured by a railroad, the point should be raised by demurrer. Crawford, J., said: "The plaintiff, in his declaration, does not allege the value of his services, but puts his case on the damages which he sustained by reason of the injury to his body, his pain and suffering, his confinement to his bed, and the actual outlay of expense in and about his being cured. It doubtless would have been more satisfactory to the judge and jury below, if the plaintiff had alleged and proved the value of his services to the road as a brakeman, as well as what his labor was reasonably worth in other pursuits, but there was no demurrer to the declaration, and the case went to the jury upon the general allegations and the proofs submitted thereunder, and it is too late after verdict to make the objection." Neel, 68/609.

674. Probability of increase of wages by appointment to office.

While it is proper to prove the age, habits, health, occupation, expectation of life, ability to labor and the probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, it is improper to allow proof of a particular possibility, or even probability, of any increase of wages by appointment to a higher public office, especially where the appointment is somewhat controlled by political reasons. Allison, 86/145. Cited, 112/926.

675. Declining years and decrease in capacity to labor.

In *Mayor, etc. v. Johnson*, 84/279, it was complained that the court in charging upon the subject of the measure of damages failed to charge that the jury should consider plaintiff's declining years, and the apparent decrease, year by year, of his capacity to labor; especially as his means of earning money is by his physical labor. Simmons, J., says: "This court has held in several cases that it was proper and the duty of the trial judge to give these

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instructions to the jury." To the same effect is McClure, 94/658. Cited, 4 G. A. 667.

676. Diminution in capacity caused by another hurt to be considered.

A charge on the subject of permanent injury, authorizing the jury to consider any diminution in the plaintiff's capacity to earn money, caused by the injury alleged in the declaration, as if such diminution would continue, from that cause alone, during the entire period of his expectancy, and up to the time of his death, and not instructing the jury to take into consideration such diminution as might be caused by declining years, or by receiving another serious injury, of which there was positive proof by the plaintiff himself, was erroneous. It appearing that the plaintiff had been injured in a wreck on defendant's road, and that about two years thereafter he had a fall which resulted in serious injury to his spine, and the plaintiff himself testifying that he "got over the first hurt," a charge based upon the theory that the injury caused to the plaintiff by the defendant was permanent, if authorized at all, should have been accurate, both in substance and phraseology. Dottenheim, 92/425.

677. Plaintiff should not conceal fact of previous affliction or wound from the jury.

The plaintiff's cause of action being based upon the theory that before the injuries therein complained of he was in all respects a perfectly sound and healthy man, there being nothing either in the declaration or the evidence introduced by him to suggest the contrary, and the newly discovered evidence disclosing that he had previously been severely afflicted with rheumatism, and had also received a gun-shot wound which permanently disabled his right arm, and the newly discovered evidence further tending to show that the injuries inflicted by the defendant were not so serious as the plaintiff had testified, the ends of justice require a new trial. It is probable, if not certain, that, in allowing the amount of damages found by the verdict, the jury acted under the belief that the plaintiff, when he received the injuries for which this action was brought, was a sound and healthy man, and, consequently, awarded a larger amount than they would have done had the facts disclosed by the newly discovered evidence been before

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them. Under all the circumstances, the plaintiff could not, consistently with good faith, withhold and conceal these facts from the jury. *Beauchamp*, 93/6. Cited, 96/485.

678. His vocation before the injury and its value.

The declaration alleging that the plaintiff's injuries had destroyed his ability to work and pursue his accustomed avocation; that his business was that of a granite and stone contractor, requiring him to be on his feet, and to exert all his physical powers in superintending, directing, helping, etc.; and that his average earnings were \$150 per month, all of which were lost for all the future—there was no error in allowing him to testify as a witness what work he did individually before the injury, and that its value was \$5 per day, the evidence showing that the work he did individually was done in pursuing his calling as a granite and stone contractor. *Beauchamp*, 93/6.

Where the person injured is a dentist, testimony as to his capacity and efficiency in his chosen profession prior to his injury is relevant, as bearing directly upon the measure of damages. *Mason*, 123/773.

The fact that one suing for a diminution of his earning capacity through an injury occasioned by the defendant was, previously to the time he was injured, a tramp is material not only on the question of his credibility as a witness, but also in measuring his damages. *Moore alias Strawhand*, 5 G. A. 562.

In *Bates*, 103/333, it appeared that the plaintiff was a banker, and it was held that in an action for damages for injuries to the person, where it is claimed by the plaintiff that his capacity to earn money has been diminished one-half, it is not error for the court to admit testimony as to the value of plaintiff's services, before the injury, in the particular occupation he was then following.

679. Plaintiff's own testimony as to diminished capacity to labor.

The plaintiff, after stating his injury, giving all the material facts touching his physical condition, his previous capacity and present incapacity for labor resulting therefrom was allowed to state how much less he could do after than before the injury. A physician gave similar testimony. The testimony of both witnesses was held to be proper. *Johnson*, 66/259. Cited, 89/501.

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Where one was injured by an accident on a railroad, after having shown the nature and character of the injury received and the deduction of his wages growing out of infirmities consequent thereon, he could testify as to the extent to which his capacity to labor was diminished in consequence of the injury he had received. *Coggin*, 73/689.

Where in an action for personal injuries one of the items of the damages claimed was the decreased capacity of the plaintiff to labor and earn money, and the petition alleged that, at the time the injuries were received, plaintiff was capable of earning and was receiving \$100 per month, evidence that, but for the injuries, he could earn \$150 per month was admissible, not as a basis for a recovery at the rate, but as tending to show that plaintiff was capable of earning the amount alleged in the petition. See *Southern Bell Tel. Co. v. Lynch*, 95/529 (2). Where the defendant objected to the admission of such evidence, on the ground that "plaintiff was limited by his declaration to a capacity of \$100 per month," its admission, without an instruction by the court properly limiting its consideration by the jury, was not cause for a new trial when it appeared from the amount of the verdict, considered in connection with the undisputed evidence in the case, that the defendant was not hurt by the failure to give such instruction. In such a case it was competent for the plaintiff, after giving his reasons therefor, to testify as to what, in his opinion, his services would be worth but for his injuries. Code, § 5874 (5285). *Smith*, 121/663.

Where, in an action for damages on account of a personal injury received in alighting from a railroad train, the petition alleged that the plaintiff's injuries were permanent, and that his ability to labor had been reduced about one half, after the plaintiff had testified as to the injury and its nature and character and given all the material facts touching his physical condition, his previous capacity, and his subsequent incapacity resulting therefrom, it was not error to allow him to state that he could not do more than half as much labor in his vocation as a blacksmith since the injury as he could before it occurred. *Johnson*, 66/259 (2), (4a); *Huggins*, 89/494. This evidence was not rendered inadmissible because the witness also testified that his injuries had affected him as a blacksmith; that he had to give up his trade on that account; that he was working in a blacksmith shop, and was fitting himself for blacksmithing. *Haralson*, 133/231.

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Where the person who was injured testified as to the extent of his injuries, and that he had suffered much pain and still suffered from his injuries, although received three years before, the court was fully authorized to charge the jury on the subject of pain and suffering and permanent injuries. The jury were authorized to infer that the effect of the injuries would be permanent, from the character of the suffering and the length of time it had continued. This is true although a physician testified that the injuries were temporary. The question was for the jury, who could, if they saw fit, attach as much probative value to the testimony of the person injured as to the opinion of the physician. *Tankersley*, 3 G. A. 548 (60 S. E. 297); *Goodwyn*, 2 G. A. 470 (58 S. E. 688); *City of Atlanta v. Champe*, 66/663; *Walker*, 93/467 (21 S. E. 100); *Streyer*, 123/279 (51 S. E. 342). *Petway*, 7 G. A. 659.

That a witness was permitted to answer, "I can not work as much since then [the time of the injury] as before," is not open to the criticism that such an answer was a mere conclusion on the part of the witness. *Dean*, 128/366.

680. When averments of age and capacity to labor are not necessary.

Where a declaration alleged that plaintiff was employed as a train-hand on defendant's freight-train, that by the negligence of other employees the accident occurred by which his fingers and a portion of his hand were so mashed as to necessitate amputation, and that his capacity to labor and earn money was thereby permanently diminished one-half, evidence as to plaintiff's age and capacity to labor was admissible without more specific allegations in regard to them. *Crawford, J.*, said: "We neither appreciate the importance, nor recognize the legal necessity in averring in the declaration the plaintiff's age, any more than we do that his size, weight, health, strength, or capacity for physical endurance should have been averred, before the proof thereof could have been received upon the issues necessarily raised by the averments which were made." *Johnson*, 66/259.

681. Proof that he played billiards to throw light on his condition.

In *Gamble*, 74/586, the plaintiff testified that his spinal column was badly injured and his nervous system shattered, producing in-

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jury to his eyes, ears and head. The court refused to allow defendant's counsel, on cross-examination, to ask him the following questions: "Are you not a good billiard-player? Do not you now frequently play?" This was error. Jackson, C. J., said: "To cross-examine thoroughly any witness is a right guaranteed by the statute in strong language. It should not be relaxed where the witnesses is interested in the case, and still less relaxed where the witness is the party in the case testifying to recover damages for himself. Skill at the game of billiards would throw light upon the point whether or not his system had been so badly deranged and wrecked."

Where a plaintiff sought to recover damages on account of physical injury, alleging in his petition that the injury was permanent and that his entire earning capacity was destroyed, and that he had not earned anything since receiving the injury, it was competent for the defendant, upon the trial of the case, to show that the plaintiff had had employment since the injury, had earned certain amounts of money therefrom and had been offered a position at given wages. In such a case, in connection with testimony tending to show that the plaintiff was capable of doing work, it was competent for the defendant to show that since his recovery the defendant (his former employer) had offered him employment at certain wages. The weight to be given to such evidence, in considering what opportunity for obtaining employment and earning money he had, was for the jury, along with evidence as to his capacity to perform the duties of the offered position. The offer of employment in this case did not appear to have been made in connection with any effort to compromise. *Holland v. McRae Oil & Fertilizer Co.*, 134/678.

682. Lost time, nominal damages allowed for, without proof of value.

Where one is tortiously disabled by a personal injury and prevented from attending to his ordinary business for several weeks, he may be allowed nominal damages, at least for his loss of time, although no definite evidence of the value of his time be submitted to the jury. *City of Greensboro v. McGibbon*, 93/672.

It was competent for the plaintiff in an action for damages resulting from personal injuries to testify that, when injured, he was earning a stated monthly salary as assistant jailer, it appearing that

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because of the injuries, he was deprived of this situation, and his salary in connection therewith, for three months. The evidence was admissible, not only to show the actual loss of salary for that period, as a basis for computing in part his damages, but also to throw light generally upon his capacity to earn money. *Prisock*, 97/643.

The action being for damages resulting from personal injuries, and the plaintiff having neither alleged nor proved anything as to lost time, it was error to charge that the plaintiff "would be entitled to recover, also, for lost time in consequence of the injury sustained," and that the jury could "look to the evidence, and see how much time he did lose, and what his time was worth." *Patillo*, 99/97.

In *Miller*, 120/453, the plaintiff was a railway mail clerk and he sued for damages for lost time. He received from the government his salary during the time he did not work. *Cobb, J.*, said: "It is necessary to determine whether the payment referred to in the testimony was of such a character as to preclude the plaintiff from claiming compensation for lost time against the railway company. When one engaged in any calling or vocation, from which he derives a pecuniary benefit, is compelled to give up, for a time, the performance of his duties, as the result of an injury inflicted upon him by a wrong-doer, he is entitled, as a general rule, to demand compensation for the time thus lost at the hands of the wrong-doer who inflicted the injury. The general rule is, that where a wrong-doer causes time to be lost, he will not be heard to say that the person injured has suffered no pecuniary loss, because he has received, as a direct result of being injured, contributions which in amount aggregate more than what would have been earned during the time; nor will his liability be diminished to the extent of contributions which were less than what would have been earned. If from motives of affection, philanthropy, or as the result of a contract, the plaintiff has received from one other than his employer any sums the reception of which is directly attributable to the fact that he has been injured, the person causing the injury will not be allowed to urge the payment of such sums in mitigation of the damages claimed against him. Thus it has been held that the damages will not be reduced by any amount of insurance received in consequence of the wrong-doer's act. See *Meigs*, 74/857 (5)." It was held that the fact that a person other than the wrong-doer,

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as a mere gratuity, pays to one injured as the result of his negligence a sum of money equal to the amount he would have earned had he been able to work during the period of disability, will not mitigate the damages due by the wrong-doer to the injured party for lost time. The rule just stated is applicable though the person making the payment is the employer of the injured party. *Quære*, whether the wrong-doer can plead the payment to diminish the amount of his liability, when, under the terms of the contract of employment, the injured party had a legal right to demand it. When a petition in an action for personal injuries contains allegations which in a general way show that the plaintiff has lost time, and evidence which fixes the time lost and the value of such time with certainty is admitted without objection, a charge that plaintiff is entitled to recover for lost time such an amount as the evidence authorizes will not be held to be erroneous, though there is in the petition no distinct claim for damages on account of lost time.

683. When minor must show that his earnings belonged to himself.

In order for a minor to recover of his employer on account of lost time, due to a permanent personal injury inflicted by his employer, damages for the whole period of his life from the infliction of the injury, he must show, so as to cover the interval between the time of the injury and the time he would attain his majority, that his earnings for that period, if he had not been incapacitated, would have belonged to himself and not to his father. *Smith*, 94/107. Cited, 8 G. A. 490.

684. The proof and charge should conform to the injury and loss alleged.

In *City Council of Augusta v. Owens*, 111/464, it was held that there being nothing either in the pleadings or the evidence which gave the jury a right to find any damages growing out of the diminished earnings of plaintiff for his labor resulting from the alleged injury, it was error for the court to charge the jury to inquire whether there would have been any increase in plaintiff's earning capacity if this injury had not occurred, and to say how much that was affected by the injury, and then allow what they believed would compensate him for that loss. *Lewis, J.*, said: "While the petition

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alleges a diminished capacity to labor, it does not allege any pecuniary loss resulting to the plaintiff in consequence of the fact of diminished earnings from labor. It does not allege what he was making before the injury, nor what he has been able to make since, and there is not a particle of evidence in the record which throws any light whatever upon the subject. The error consists, therefore, in opening up to the jury the right to investigate a matter with the view of increasing damages, by suggesting a measure of damages upon which they have no data whatever to base any finding."

It was not erroneous, in the trial of an action for personal injuries and pain and suffering resulting therefrom, for the judge, in charging the jury, to omit calling their attention "to the effect of advancing years upon the capacity of plaintiff to labor," when the declaration did not allege that the injuries complained of were permanent, and the action was apparently brought to recover only the damages sustained before the filing of the petition. *Pitts*, 112/846.

Where in an action for personal injuries the declaration alleges that all of the plaintiff's injuries will continue for a long time, and prevent her having free use of her person; that the injuries to her side and arm are permanent; that she will not be able for a very long time, by reason of said injuries, to discharge her domestic duties; and that her capacity to earn money has been destroyed for a long period of time, and permanently decreased one-half—it is not error to permit a witness to testify that the condition of the plaintiff, ten years hence, if it continues going on as it is, will be that of a confirmed invalid; the court instructing the jury that they can not consider any permanent damages except to the arm and side, and that evidence as to the duration of other injuries can be considered only as showing that the injuries will extend for some time in the future. *Johnson*, 90/500. Cited, 133/235.

Where on the trial of an action for damages for personal injuries counsel for the plaintiff announced to the court and jury that he claimed nothing for permanent injuries, a charge of the court which, fairly construed, authorized a recovery for permanent injuries was erroneous, and, when the verdict for the plaintiff was, under the evidence, extremely liberal, cause for a new trial. *Clari-day*, 120/465.

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685. Hearsay evidence as to age and place of birth and to explain conduct.

A witness may testify to his age, without first requiring him to show from what source he derived his information, and when and where he was born. The correctness of his statement may be tested on cross-examination by asking whence he derived his information, and likewise the time and place of his birth; but on such subjects hearsay evidence is admissible from the necessity of the case. *Coggin*, 73/689.

Hearsay testimony is permissible in explanation of conduct, or, as in this case, for the purpose of identifying and locating objects referred to in the testimony. *Stamps v. Newton County*, 8 G. A. 229.

686. Injury to particular organs shown under general allegation as to vital organs.

A declaration which alleged that plaintiff "in his body, was violently and grievously bruised, mangled and broken, to wit: In and upon his head, arms, legs, and body, and particularly as to the serious injury and wounding of his internal vital organs," is sufficient to permit testimony of injury to kidney, urinary organs, bloody urinal discharge, and the nervous system. *Mitchell*, 63/173. Cited, 117/181.

The petition alleging that there was a collision between the plaintiff's vehicle and a car of the defendant, which threw him upon the ground, injured his back, left leg, and hip, caused concussion of the spine, and inflicted other bruises and injuries upon his body, it was permissible to introduce evidence showing injury to plaintiff's urinary organs. *Maddox*, 117/181.

687. When married women may recover for expenses.

The suit, *Lewis v. City of Atlanta*, 77/756, was brought by a married woman to recover damages for a personal injury caused by obstructions in a street. It was held that she could not recover for expenses incurred by her in consequence of the injury, unless actually paid by her, there being no testimony to show that she was living separate from her husband, that she was a free trader, that she had any separate property, or that she personally undertook to pay any of these expenses or in any manner bound herself

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to do so. The married woman's law does not have the effect of giving her the right to recover for such expenses without joining her husband in the action and without any proof upon the points stated.

VINDICTIVE DAMAGES.**688. Vindictive damages.**

In an action for damages against a railroad company on account of the wrongful expulsion of the plaintiff from one of the defendant's trains, where the plaintiff sues for the value of lost time and for expenses thereby incurred, as well as for punitive damages, it is erroneous to give in charge to the jury the provisions of § 4504 (3907) of the Code, which has reference only to actions where the entire injury alleged is to the peace, happiness, and feelings of the plaintiff. *Almand*, 116/780. Cited, 117/551, 785; 125/462; 128/815.

In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed. The verdict of a jury, in such a case, should not be disturbed, unless the court should suspect bias or prejudice from its excess or its inadequacy. Code, § 4504 (3907). The evidence did not warrant a finding against the defendant for punitive damages; and therefore a charge which in effect instructed the jury that they were authorized to find such damages was erroneous. This not being a case where the entire injury sued for was to the peace and happiness of the plaintiff, it was erroneous to instruct the jury that they might take into consideration the worldly circumstances of the parties and the amount of bad faith in the transaction. *Almand*, 116/780; *Benton*, 117/785.

Where in a suit based upon an alleged tort, resulting in personal injuries to the plaintiff, damages are claimed for lost time, expenses for medical and surgical treatment, permanent diminution in earning capacity, caused by the physical injuries received, and mental and physical pain and suffering caused by such injuries, it is erroneous to charge the jury the provisions of the Code, § 4504 (3907) relative to suits for torts wherein the entire injury alleged is to the peace, happiness, or feelings of the plaintiff. *Broughten*, 128/814.

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In an action for damages against a railroad company, where the plaintiff sues for the value of lost time, physical pain and suffering, physician's bill, permanent physical impairment, and the consequently diminished capacity to labor, alleged to be the result of personal injuries sustained in consequence of the negligence of the defendant company and its employees, it is error to give in charge to the jury the following provisions of the Code, § 4504 (3907). "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors." **Bowen**, 125/460. Cited, 128/815.

While the evidence demanded a finding in favor of the plaintiff so far as the right to recover was concerned, the erroneous instruction in relation to the worldly circumstances of the parties was of such a character as to require the granting of a new trial. **Cobb**, P. J., said: "In the instructions on the subject of damages the court charged: 'The worldly circumstances of the parties and all the attendant facts are to be weighed.' This charge was assigned as error, for the reason that there was no evidence to authorize it. There was no evidence as to the worldly circumstances of the parties." **Baker**, 125/562.

689. When worldly circumstances of the parties not involved.

In an action against a railroad company for an injury to the plaintiff's eye, caused by a spark or cinder from the defendant's engine, there was no error in refusing to permit the plaintiff to prove that the defendant was worth from two to three hundred thousand dollars. **Higgins**, 73/149. Cited, 73/256; 116/783; 6 G. A. 374.

The suit of **Homer**, 73/251, was brought to recover damages for being wrongfully ejected from a train. On the trial the court admitted evidence to show that the defendant was worth about \$5,000,000. It was held that the admission of this testimony was error and that except in cases where the entire injury is to the peace, happiness or feelings of the plaintiff, worldly circumstances should not be admitted or weighed in the ascertainment of damages. This was the common law. Cited, 88/775; 91/813; 93/461; 105/317.

In **Brunswick Light, etc., Co. v. Gale**, 91/813, it was held that the action being by a married woman for physical injuries and their

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consequences, the terms of § 4504 (3907) of the Code are not literally applicable to the same, but the principle of the section, except as to proving the wordly circumstances of the parties, is applicable. Inasmuch as the earnings of the wife belong to her husband, her individual and personal damages can be measured only by the enlightened conscience of an impartial jury. Simmons, J., said: "It was error to give in charge this section of the Code as applicable to the case under consideration, for it is only applicable as a whole to that class of cases where the entire injury is to the peace, happiness, or feelings of the plaintiff. But where, as in this case, a married woman sues for physical injuries and the pain and suffering resulting therefrom, and can not recover for loss of earnings, medical attention, etc., the principle of the section is applicable, inasmuch as her damages can be measured only by the enlightened conscience of an impartial jury. She is not allowed, however, to prove, nor can the jury take into consideration, as provided by this section, the worldly circumstances of the parties, the amount of bad faith in the transaction, etc."

In *Hardage*, 93/457, a married woman sought to recover damages for wrongful expulsion from a car. The judge gave in charge to the jury § 4504 (3907), and it was held that the terms of that section are not literally applicable, though the principle of the section, except as to considering the wordly circumstances of the parties, is applicable in so far as injury to the feelings is concerned. Bleckley, C. J., said: "The letter of this section does not apply, for where a common carrier wrongfully expels a passenger the entire injury is not to peace, happiness, or feelings. A part of the injury consists in the violation of a public duty by the carrier, and in the inconvenience and delay occasioned the passenger. But the principle of this section, except as to considering the worldly circumstances of the parties, is applicable both as to the measure of damages on account of wounded feelings, and the weighing of all the attendant facts, including the presence or absence of bad faith. In estimating damages for injury to the feelings, whether the entire injury, or only part of it, consists of that element, no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The charge was inapplicable and erroneous in so far as it made any reference to the worldly circumstances of the parties." Cited, 105/317.

Where damages were claimed, both for physical pain and suffer-

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ing from wounds received by the plaintiff, and also on account of loss of business and inability to labor, it was error for the court to charge the jury, without qualification, that "in some torts the entire injury is to the peace, happiness and feelings of the plaintiff. In such cases, no measure of damages can be prescribed, except the enlightened conscience of impartial jurors." The court should, at least, have qualified this charge by instructing the jury that, so far as the expenses incurred by plaintiff for medical attention and other expenses of like character were concerned, and so far as she was damaged by loss of time, inability to labor and to attend to business, if they found for the plaintiff, they should find the actual damage sustained by her, as shown by the evidence, and that they might add to that such sum as damage for the physical pain suffered by the plaintiff, and other injuries of that character where the actual damage can not be ascertained by any rule of evidence as in their enlightened conscience they may think reasonable and just. *Senn*, 73/705. Cited, 79/647; 105/317; 116/783; 130/698.

Though where special damages, such as expenses of nursing, physicians' bills, medicine, etc., are sought, the rule of assessment according to the enlightened consciences of impartial jurors is not applicable, it is so where the special damages alleged are not insisted upon, and the only recovery sought is for injuries to the person and for pain and suffering. *Randall*, 85/297.

Evidence as to the worldly circumstances and business success of the plaintiff is irrelevant and inadmissible in a suit to recover damages for an inexcusable trespass by the conductor in ejecting him from a street-car. *Badenhoop*, 6 G. A. 371.

690. Subject continued.

In *Bryant*, 105/316, it appeared that two young ladies purchased railroad-tickets over the line of the Southern Railway Company from Atlanta to a flag-station called "Hamlet." It seems that the engineer omitted to give the signal of an approach to Hamlet, by reason whereof the conductor failed to signal the engineer to stop at that place. The conductor did not discover that the train had passed Hamlet until it had gone about half a mile beyond. He then apologized to the ladies for having carried them beyond their station, expressed his regret, and told them that he would either leave them at the next station, or carry them on until he met the down train, put them on that, and have them brought back to Hamlet.

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They chose to stop at the next station. On arriving there, they alighted, and were carried into the reception-room at the station, where there was a good fire and light. There they remained for about three hours, when they boarded the down train. They arrived at Hamlet shortly before day. There was no one to meet them at that place, and they walked a quarter of a mile, through a field, to their father's house. They brought their actions against the railway company for damages, and on the trial of the case the jury returned verdicts for both of them—\$250 in favor of one, and \$300 in favor of the other. The court gave § 4504 (3907) in charge to the jury. This was error, and Simmons, C. J., said: "In several decisions of this court it has been declared error to give the whole of that section in charge in cases like the ones now under consideration, or even in cases where actual physical injuries have been sustained. In cases of this character the wordly circumstances of the defendant should not be considered by the jury. In these particular cases the question of defendant's bad faith should not be considered, for there was no evidence to authorize the judge to charge upon this subject, nor facts shown from which the jury could properly infer bad faith upon the part of defendant. The plaintiffs do not claim to have sustained any pecuniary injury for loss of time or expenses incurred, nor that they have sustained any physical injury; and the only part of this section which should have been given in charge (and even then not in the words of the section) was that the jury could give such damages as their enlightened consciences might approve. These sections of the Code can not properly be given in every case sounding in tort. They simply announce principles, and, as a whole, are not applicable to every case. The trial judge may give one principle in one case and another in another case, giving each as the facts of the case may require or warrant. It may have been that these erroneous charges caused the jury to find these excessive verdicts. The jury may have considered, without proof, the worldly circumstances of the railway company, and may have thought that a rich corporation had acted in very bad faith because its engineer had failed to signal the approach to the station, and may have come to the conclusion from these facts that these young ladies were entitled to such large damages for a detention of three hours in a comfortable room. The evidence shows that they suffered no loss, were not frightened, were well-treated and comfortable. The conductor was polite, and the agent at the

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station where they stopped over treated them with courtesy. Their only annoyance appearing in the record was that one of them thought their father would be disappointed at their not arriving at their home at the time appointed. We can not conceive how an honest jury, acting without partiality or bias against the defendant, could, under the facts, have returned such verdicts. There are hundreds and thousands of women, and men, too, in this country, who work daily the whole year for less than was given by the jury to these girls for the slight inconvenience of being detained three hours. If these girls had hired a carriage and driver and the latter had driven them two miles beyond their destination as a result of unintentional negligence, and brought them back after they had waited three hours in a comfortable room, we have no idea that, in suits by them against the owner of the carriage, these jurors would have returned these verdicts. Yet the law is the same in both cases."

The action being for personal injuries actually received by the plaintiff, it is not cause for a new trial that the court gave in charge to the jury so much of § 4504 (3907) of the Code as is embraced in the following words: "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff. In such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors"—it appearing that in other portions of the charge the judge properly instructed the jury in what particulars they should find only the actual damages sustained, and that he confined the application of the rule embraced in the above-quoted language to the damages resulting from pain and suffering, and the like. Keating, 99/308. Cited, 128/816.

In a suit for damages against a railroad company, based on alleged negligence of the defendant in carrying the plaintiff by the station of her destination, where the plaintiff's evidence fails to disclose that she suffered any physical injury, and the utmost damage proved is the inconvenience of several hours delay and the missing of her dinner by the plaintiff; and where the conduct of the employees of the railroad company was not such as to authorize the grant of punitive damages, but on the contrary was in every respect courteous and accommodating, a verdict for the plaintiff for \$249.50 is unwarranted and should be set aside by the trial judge as excessive. Wood, 118/172.

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691. Vindictive damages allowed where conductor was impolite and gruff.

In Keeny, 99/266, plaintiff tendered to the street-car conductor a rare but genuine coin in payment of his fare. It was refused, and the conductor said to the plaintiff: "You will pay the fare or get off the car mighty quick." The car was stopped and plaintiff got off. The manner of the conductor in addressing the plaintiff was very impolite and gruff according to the plaintiff's testimony, which was denied by the conductor. The court charged in the language of §§ 4503 (3906) and 4504 (3907) of the Code, omitting any reference to the worldly circumstances of the parties. Error was assigned upon the charge on the ground that the evidence did not justify any charge which would authorize vindictive damages. It was held that there being evidence tending to show that in ejecting the passenger the conductor used to him insulting language, and was "very impolite and gruff," the court was not unwarranted in charging the jury upon the law of vindictive damages. No opinion was written in the case.

692. No special damage being proved, the amount of general damage is for enlightened conscience of the jury.

In Roberts, 91/513, the plaintiff held a ticket on which he claimed the right to ride on a certain fast train. The right was denied by the conductor, and the plaintiff was expelled. It was held that a passenger who brings an action of tort for wrongful expulsion from a train is not restricted to a recovery as for breach of contract, but may recover for his injury as a tort. The amount of general damage, no special damage being proved, is matter for the enlightened conscience of an impartial jury. And Bleckley, C. J., said: "In such an action as the present, where it is well founded, a recovery may be had for the injury as a tort, as a breach of a public duty by a common carrier—a duty imposed by law—though involving in this breach a breach of contract also. The passenger could elect to sue only for the breach of contract, and, did he so elect, his recovery would be limited to nominal damages, if he failed to prove any special damage. But this action being for a tort, and no special damage being proved, proof of the tort, and the circumstances attending it, would entitle the plaintiff to recover such amount as the enlightened conscience of an impartial jury would sanction as fit for

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the plaintiff to have, and the defendant to pay. There is no other measure of damages for a case." Cited, 102/819.

Where, in the trial of a case, evidence has been introduced tending to show that mental and physical pain has resulted from the wrongful act to recover damages for which the action was instituted, it is not error to instruct the jury that there is no fixed rule for computing damages of this nature, but that the same are left to the enlightened conscience and intelligence of impartial jurors. Gresham, 114/183.

693. Aggravation.

In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. Code, § 4503 (3906).

This section embraces every tort of every character and description, committed by every kind of wrong-doer.

The aggravating circumstances may be either in the act itself, or in the intention of the wrong-doer.

The objects for which the additional damages are given are either :

To deter the wrong-doer from repeating the trespass, or

As compensation for the wounded feelings of the plaintiff.

The damages allowed under this section pass the limit of compensation for the injury actually sustained—they are "additional damages."

When there is no evidence to authorize it, it is error to give Code sections in charge to the jury. Bankston, 131/604.

It was error to charge the jury that if the words and actions of the defendant's servant were such as to insult and annoy the plaintiff, and to worry her, and humiliate her, she would be entitled to damages. There can be no recovery for annoyance and worry. And the jury should also have been instructed that the facts and circumstances should not only have been such as did humiliate and insult the plaintiff, but such as would reasonably tend to humiliate any person in similar circumstances. The damages recoverable for tort, in this State, are restricted to injuries to person, property, and reputation. Baker, 1 G. A. 832.

It is error, after giving in charge § 4503 (3906) of the Code,

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and without any other or further instructions as to the measure of damages, to charge the jury that this section would be the rule under which the jury would assess damages, in case they found the defendant liable. In every case the jury should be properly instructed as to the measure of damages applicable to the facts of the particular case. *Baker*, 1 G. A. 832.

It is erroneous to instruct the jury that they can give compensatory damages for wounded feelings and additional punitive damages, in the event aggravating circumstances appear, for the purpose of deterring the wrong-doer or compensating the plaintiff for wounded feelings. There can be no double recovery of damages for the purpose of compensating the plaintiff for wounded feelings. *Davis*, 6 G. A. 645.

Where there has been a breach of a duty giving rise to a cause of action, and the injured party claims punitive damages, all the surrounding circumstances, accompanying the breach of duty, may be given in evidence to the jury. *Russell, J.*, said: "It is claimed that the judge erred in allowing one of the witnesses to testify that the plaintiff was ejected at a point where there was a switch-engine coming down the track toward him, and a freight-train also moving about on the side-tracks. It seems that the plaintiff was ejected at a place called Junta, at which the defendant has several side-tracks. The evidence was properly admitted, on the idea that it tended to show that the passenger was ejected at a dangerous place, and that this was an aggravating circumstance to be considered by the jury in determining the right to recover exemplary damages. It was relevant for that purpose." *Forrest*, 6 G. A. 766.

It was held in *Jordan*, 129/665, that one of the charges excepted to was subject to the criticism that it authorized a double finding of damages for wounded feelings, and the court erred in not granting a new trial on account of this error. *Fish, C. J.*, said: "One ground of the motion for a new trial was, that the court erred in instructing the jury as follows: 'She [plaintiff] alleges that the wrongful conduct of the agents of the defendant company wounded her feelings, and asks damages for wounded feelings. If there was a tort or wrong done her by the defendant company and it caused her wounded feelings, then she would be entitled to recover damages for this. Then in addition to this, gentlemen, she asks that she be allowed additional damages as exemplary damages on account of the wrongful conduct of the defendant company. Now,

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this is the rule as to that: In every tort there may be aggravating circumstances either in the act or intention, and in that event the jury may give additional damages, either to deter the wrong-doer from repeating the transgression, or as compensation for the wounded feelings of the plaintiff. Gentlemen, before the plaintiff would be entitled to recover additional damages as exemplary damages, it must appear that there were aggravating circumstances either in the acts or intention of the agents or employees of the defendant company.' One of the exceptions to this charge was, that it authorized a double finding by the jury for wounded feelings. We think this exception well taken, as it will be seen that the court instructed the jury that the plaintiff would be entitled to recover damages for wounded feelings, if her feelings had been wounded by a tort committed on her by defendant, and then further instructed the jury that, in addition to such damages, the plaintiff asked that she be allowed exemplary damages, on account of the wrongful conduct of defendant's agents, and in effect charged that the plaintiff would be entitled to recover such additional damages for wounded feelings, if it appeared that there were aggravating circumstances either in the acts or intention of the agents of the defendant. This authorized a double finding for wounded feelings." Cited, 6 G. A. 645.

694. The kind of cases to which the section applies.

In Liddell, 85/482, suit was brought for damages to a passenger from the derailing of the coach on a deflection track, and the court charged the jury: "If the evidence discloses from all the facts that have been submitted to you that this railroad was grossly negligent, then plaintiff would be entitled to recover what we call 'punitive damages,' to punish them for that negligence, and there is no measure of damages then. It is for you to say, from all the facts and circumstances that surround the case, to what extent you ought to add to your verdict for this plaintiff to punish them." Simmons, J., said: "We think the court erred in this charge to the jury. In the case of *Railroad Co. v. Arms*, 91 U. S. 489, the Supreme Court of the United States held: '(1) A passenger in a railway-car who has been injured in a collision caused by the negligence of the employees of the company, is not, as a general rule, entitled in an action against the company to recover damages beyond the limit of compensation for the injury actually sustained. (2) Exemplary damages should

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not be awarded for such injury unless it is the result of the willful misconduct of the employees of the company, or of that reckless indifference to the rights of others which is equivalent to an intentional violation of them.' The court, in discussing the question, says: "Gross negligence" is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term "ordinary negligence;" but after all it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident; but the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train, and the court therefore misdirected the jury.' Wood, in his notes to Addison on Torts (vol. 2, p. 646), says: 'In order to warrant a jury in giving vindictive damages, something more than mere unlawfulness must be shown. There must be evidence either of malice, fraud, wantonness, or oppression. The act must have been done under such circumstances as show a disregard for the rights of others, or an intention to set at defiance the legal rights of others, or the ordinary obligations of society.' Under these rules, which seem to us to be sound, we do not think the evidence of negligence in this case was sufficient to authorize the court to charge the jury that they might find punitive damages. Even if it was we would still hold, under the rulings of this court, that the charge of the trial judge was erroneous." The judge charged that exemplary damages might be given as a punishment of the railroad company, while the Code says, they may be given "to deter the wrong-doer from repeating the trespass." Cited, 119/149; 132/149.

To authorize the imposition of punitive or exemplary damages there must be evidence of willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Under the facts disclosed by the record, it was error to charge upon the subject of such damages. Cobb, J., said: "Mere negligence can never amount to such aggravating circumstances as to warrant

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the imposition of such damages; and this is true though the negligence be gross. This was ruled in *Liddell*, *supra*, a leading case on the subject. The authorities approved in that case show the rule to be, that, to justify the imposition of exemplary damages, 'there must have been some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences;' and that 'there must be evidence either of malice, fraud, wantonness, or oppression.'" O'Bryan, 119/147. Cited, 119/298; 125/358; 127/132; 128/398; 129/666; 132/816; 3 G. A. 142. To the same effect, Sowell, 3 G. A. 142.

In *Harden*, 101/263, the plaintiff held a ticket to Reeves Station. She was carried, against her wish, to a station two miles beyond Reeves Station. It was held that in an action instituted for the recovery of damages for the commission of a mere negligent tort, which involves no actual physical invasion of one's rights of person or property, but which consist in the omission to perform a private duty springing out of the relation of carrier and passenger, the breach of which results in damage to the person to whom that duty is owing, the law of trespass is not involved; and it is therefore error in such a case for the trial judge to give in charge to the jury that portion of § 4503 (3906) of the Code which provides as follows, "either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff;" but upon the trial of such a case it is proper to give in charge to the jury that portion of the section of the Code above referred to which precedes the words above quoted. Atkinson, J., said: "It can not in any just sense be said that a mere negligent omission upon the part of a carrier to stop its train at a given point, to which it has undertaken to transport a passenger, is a trespass against such passenger. The word 'trespass' embraces only that class of torts which involves a violent, unlawful, physical invasion of one's right of person or property; and this classification necessarily excludes those acts of one person resulting in injury to another which arise from a mere omission to perform a duty imposed upon the party bound to perform by the terms of a contract entered into between them. If, then, the injury complained of consists of a mere omission to perform such a duty, it can not, in any just sense, be said that the person complained against has committed a trespass upon the person of the other; and, if no trespass has been committed, surely the court is not authorized to give in charge a provision of the law

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which is designed to authorize the imposition of additional damages by way of deterring the wrong-doer from the commission of a trespass only. There are cases of expulsion from railroad-trains which involve, not only the breach of the contract of passenger-carriage, but likewise the unlawful invasion of the personal rights of the passenger in forcibly expelling him from the train. Such was the case of *Head*, and in such a case it is entirely proper for the court to give in charge to the jury, not only that portion of the section of the Code above referred to, which authorizes the jury to assess additional damages to deter the wrong-doer from repeating the trespass, but likewise authorizes them to give additional damages as compensation for the wounded feelings of the plaintiff. The facts of the present case, if the testimony of the plaintiff is to be believed—and this we take as true—the jury having found in her favor, make a case of a mere negligent omission properly to perform the contract of passenger-carriage, resulting in inconvenience to the passenger, and in personal injuries received by her in attempting to alight from the train. The acts of the defendant were acts of omission only. No trespass, in a legal sense, was committed upon the person of the plaintiff; and we are therefore fully persuaded that the instruction given to the jury by the trial judge which is above criticised was entirely unwarranted by the evidence.” Cited, 105/317. This case again, 107/379.

In *Bryant*, 105/316, two young ladies, who had purchased tickets to a flag-station called *Hamlet* were carried beyond that station. They left the train at the next station. They sued for damages and it was held that, in an action for damages growing out of a breach of contract of carriage entered into between a passenger and a railway company, it was error to give in charge to the jury § 4503 (3906) of the Code. Cited, 118/173; 119/149.

In an action for damages for a personal injury, based on negligence alone, and in which, under the pleadings and evidence, no question of wilfulness, wantonness, malice, oppression, or conscious indifference to consequences is involved, it is error to charge that “In every tort there may be aggravating circumstances either in the act or the intention, and in that event the jury may give additional damages either to deter the wrong-doer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.” *Lumpkin, J.*, said: “A failure to comply with a statutory requirement as to the giving of a signal or the taking of some precaution

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in connection with railway crossings, and which merely raises the standard of diligence, is different from disobedience of a statute in regard to something which is *malum in se*. Whether the terms 'wilful or wanton negligence,' which are sometimes employed, be accurately used or not, they do not mean that mere negligence alone, as a rule, authorizes charges on the subject of exemplary and punitive damages. See, on the general subject, 4 Elliott on Railroads, § 1801 and notes; 1 Thomp. Neg., § 22; Ala. Great So. R. Co. *v.* Mooror, 110 Ala. 742, 744 (22 So. 900); Parker *v.* Penn. R. Co. 134 Ind. 673 (34 N. E. 504, 23 L. R. A. 552)." Davis, 132/812.

In an action for damages against a railroad company, for injuries sustained by reason of the negligent running of the defendant's locomotive and train of cars, wherein damages are claimed for physical pain and suffering, and also for inability to labor occasioned by such injuries, as well as for the cost of medicine and other expenses, it is erroneous for the court to charge, without qualification, that: "In every tort there may be aggravating circumstances, either in the act or in the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff. In some torts the entire injury is to the peace and happiness of the plaintiff. In such cases no measure of damages can be prescribed, except the enlightened conscience of the jury." O'Bryan, *supra*, and cit. McLendon, 119/297.

In Hill, 125/354, Fish, C. J., said: "Under the uncontradicted evidence, the plaintiff and his team, at the time it was frightened, were within fifteen or twenty feet of the railroad track on which defendant's engine was running. There were no cars then attached to the engine, and it was running backwards towards plaintiff's team, which was, relatively to the engine, on the engineer's side, and the team was going towards the engine. The plaintiff and another witness testified that the engineer was looking directly towards the plaintiff and his team and saw his peril, when the engineer caused the alleged unusual and unnecessary noises to be made by the engine and the steam and smoke to escape, which frightened the team. There was, therefore, ample evidence to authorize the instructions on the subject of punitive damages, for the jury might have found, from this evidence, that the acts of the engineer were unnecessary, wanton, and malicious." See O'Bryan. It was held that the charge as to punitive damages was not without evidence to authorize it.

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When, in the trial of an action against a railroad company, it appears that the plaintiff, who was a passenger, was pushed by the conductor from a train which was in motion, though moving slowly, at a station at which he did not desire to alight, and, as a result, he sustained injury, an instruction to the jury on the subject of punitive damages was not inappropriate. Cobb, J., said: "While the plaintiff does not in terms say that he suffered both in body and in mind, he does recount the circumstances under which he was pushed from the train, and states that he suffered much pain at the time of the injury and thereafter, and still suffers pain. While it might be said that his language refers merely to physical pain, yet when the circumstances under which he was injured are considered, it is necessarily to be inferred that the pain suffered by him was both mental and physical. The character of the injury, the circumstances under which it was inflicted, and the positive evidence of the plaintiff that he suffered pain, were all before the jury; and we think this was sufficient to authorize a charge on both mental and physical suffering." Potts, 128/397.

695. Subject continued.

In Hardage, 93/457, it was held that in an action by a married woman against a common carrier for wrongful expulsion from a car, § 4503 (3906) of the Code may apply, both in letter and in spirit. Bleckley, C. J., said: "According to the plaintiff's evidence, her fare had been paid for a passage to the end of the line. She and her infant were both sick. They were put off by the conductor, without any reason or justification whatever, before the end of the line was reached, and when it was about a mile distant. It does not appear what the conductor's intention was, but the act itself was an outrage. It was a gross violation of the duty of the carrier, and a gross disregard of the rights of the passenger."

In Harden, 101/269, Atkinson, J., said: "Head's case involved, not only the breach of the contract of passenger-carriage, but likewise the unlawful invasion of the personal rights of the passenger in forcibly expelling him from the train, and in such a case it is proper for the court to give in charge, not only that portion of § 4503 (3906) of the Code which authorizes the jury to assess additional damages to deter the wrong-doer from repeating the trespass, but likewise authorizes them to give additional damages as compensation for the wounded feelings of the plaintiff." Cited, 105/317.

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In *Brauss*, 70/368, plaintiff and his wife entered a street-car, and presented to the conductor tickets entitling them to ride to their point of destination. Plaintiff informed the conductor where he wished to go. Between the beginning and the end of the journey it was necessary for plaintiff to be transferred from one car to another, and he was transferred personally by the conductor of the first car, but was given no transfer-ticket, nor did he know that one was necessary. Subsequently the conductor of the second car called for a transfer-ticket or another payment of fare, and in default thereof ejected the plaintiff and his wife, requiring them to get off the car in the mud a short distance from the street-crossing, and in the presence of a number of people. The conductor's manner was "very short." There were about thirty people in the car, and plaintiff testified, over objection, that he was much ashamed and wounded in his feelings when required to leave. There was no averment of special damage, nor was any actual damage shown. A nonsuit was moved on the ground that the action was one *ex contractu* with no actual damages shown. It was held that it was not a suit to enforce a contract. That it was a tort founded upon a contract; that the case made was one authorizing exemplary damages in a suit against the company, and that testimony of the plaintiff that his feelings were hurt was properly admitted. Hall, J., said: "This provision of our Code is as applicable to the conductors of street-cars as to the conductors of railways. It is comprehensive in its terms, and embraces every tort of every character and description, committed by every kind of wrong-doer, and visits upon the offender exemplary damages, or damages to compensate for wounded feelings." Cited, 75/202; 77/681; 120/286; 6 G. A. 373.

In *Head*, 79/358, the declaration alleged that the plaintiff contracted with defendant, through its agent at Tallapoosa, Georgia, to be carried and returned from that town to New Orleans, receiving a round-trip ticket. Owing to some mistake in signing and stamping the ticket by the agent, return passage on it was refused by defendant's agents. Plaintiff complied with every part of his agreement, and the irregularity in the tickets was entirely due to the wrongful conduct of the agent at Tallapoosa. He presented the ticket to the conductor, who refused to take it, notwithstanding plaintiff's statement that its irregularity was through the fault of the agent at Tallapoosa. The conductor stopped the train and forcibly ejected the plaintiff. The cars were filled with passengers,

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and plaintiff was greatly troubled and his feelings injured by the forcible expulsion and the rejection of his ticket. The court charged the jury that the plaintiff could only recover his actual damages. It was held that an action on the case by a passenger against a railroad company for wrongfully expelling him from the train with force and violence, though the declaration allege a contract of carriage, is not for breach of the contract, but for a tort by breach of duty, and punitive as well as actual damages are recoverable if the circumstances of the particular case warrant such recovery. Bleckley, C. J., said: "Where the plaintiff has a contract with the defendant which generates a relation attended with a public duty, he has his option to bring assumpsit for the breach of the contract, or case for the breach of duty. Here the plaintiff brought a proper action, the contract being set out merely as inducement, with a view to raise the relation, the stress of the action being put upon his expulsion from the train, which, if wrongful, was not only a breach of the contract, but a violation of a public duty by a common carrier. Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; one mental, the other physical. In either case the damage is not measurable with exactness. There can be a closer approximation in estimating the damage to a limb than to the feelings; but at last the amount is indefinite. The jury would have a much wider discretion in dealing with feelings than with an external injury. At common law, compensatory damages include, upon principle, and I think upon authority, salve for wounded feelings; and our Code has no purpose to deny such damages where the common law allowed them. And suppose we call the damages punitive, they are recoverable in such a tort as this if the circumstances were aggravated either in the act or in the intention. Olds, *infra*. Putting a man off a train wrongfully is a high-handed measure." Cited, 84/417; 101/269; 102/476; 116/625; 120/285; 130/697; 2 G. A. 851.

A railroad company is liable in damages for an injury to the feelings and sensibilities of a passenger, caused by his wrongful expulsion from one of its cars, though such passenger may not have received any physical injury thereby. Mabry, 116/624. Cited, 130/697.

Punitive damages are recoverable in an action against a railway company by a passenger, where the evidence shows that he was,

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without justification or excuse, forcibly expelled from its train by the conductor or other employees in charge thereof. *O'Quin*, 124/357.

In *Dunn v. Western Union Telegraph Co. et al.*, 2 G. A. 845, it was held that every public-service company owes to such members of the general public as have occasion to transact with it the business it is accustomed to perform the duty of affording them safe and decent access to the office or other place where such transactions are to be had. It must see that those members of the public who come to the usual and appointed place to deal with it are accorded respectful treatment. A breach of this duty, whereby injury results to a person lawfully and properly attempting to deal with it, is actionable. A telegraph company is a public-service corporation. If a person enters a telegraph office with the intention of delivering a message for transmission, and, without provocation, the agent in charge of the office orders him out, and insults and humiliates him by abusive language, a cause of action against the telegraph company arises in favor of such person. While mental suffering, unaccompanied by injury to purse or person, affords no basis for an action predicated upon wrongful acts merely negligent, yet such damages may be recovered in those cases where the plaintiff has suffered at the hands of the defendant a wanton, voluntary, or intentional wrong the natural result of which is the causation of mental suffering and wounded feelings. *Powell, J.*, said: "That damages for mental suffering are compensatory in character can hardly be open to question. Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; the one mental, the other physical. *Head*, 79/358, 360; *Smith v. Overby*, 30/241. Such damages may in the very nature of things be just as proximately and naturally the consequence of the defendant's wrong as any other damage; so that there is no legitimate objection to their allowance for any lack of this element. Of course there may be cases where mental suffering is not a proximate and natural result of an injury, but this is true as to any other form of damage. Nor can it be justly said that an allowance for mental suffering is any more speculative or conjectural than damages for physical pain and suffering. Those cases which preclude recovery of damages for mental suffering, when no other injury is shown, can not fairly rest on any of these grounds; but must be based upon the theory pre-

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sented by Allen, J., in the case of *Spade v. Lynn, etc.*, R. 168 Mass. 285, that the rule is purely arbitrary, though actually existent in certain classes of cases. See also *Homans v. Boston Elevated Ry. Co.*, 180 Mass. 456, wherein the court, through Holmes, J., says that the rule, being arbitrary, is not to be extended. This arbitrary rule is generally applied only to those cases where the injury is the result of mere neglect. The leading case of *Chapman v. Western Union Tel. Co.*, 88/763, as well as the cases which have followed it, puts this State in line with those that hold that in actions on account of wrongs merely negligent, mental suffering unaccompanied by other injury can not be the basis of a recovery. Those courts, however, who assert this doctrine even most strenuously, do not extend its application to those intentional injuries of which insult, humiliation, and mental suffering are the natural consequences. As Allen, J., in the *Spade* case, *supra*, says: 'It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown or is reasonably to be inferred.' By this distinction, there can be seen between the case of *Chapman v. Telegraph Company, supra*, and that of *Code*, 102/474, a clear, logical discrimination. The holding in the *Cole* case is undoubtedly the law, and is unequivocally supported by authority. There a railway conductor intentionally and wantonly insulted a passenger, not by using slanderous language to him, as the court intimates in the opinion (for the language was not *per se* slanderous, and there were no allegations stating it to be so for any special reason), but by using to him insulting and humiliating language. The whole injury was to the plaintiff's feelings. The court says that case is distinguishable from the *Chapman* case; and it is; not because the plaintiff in the *Cole* case was slandered, but because that was an action upon a malicious and intentional tort, the other upon a merely negligent though wrongful omission. See *Watson on Damages*, § 399; *Burdick, Law of Torts*, 101; *Wilkinson v. Downtown* [1897], 2 Q. B. 57 (wherein a recovery was upheld in favor of a wife for mental shock on account of defendant's falsely and maliciously telling her that her husband had been seriously wounded); *Rice v. Rice*, 104 Mich. 371 (where a recovery by a wife for mental suffering occasioned by the alienation of her husband's affections was held proper, though no financial loss in the matter of support was shown). See also *Barber v. Reese*, 60 Miss. 906; *Conklin v. Thompson*, 29 Barb. (N. Y.) 218."

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696. "Punishing the defendant" and "justice and the public good" should be omitted in charging the jury.

In *Ratteree v. Chapman*, 79/574, the court charged the jury: "If you believe from the evidence that the defendant, without provocation, assaulted and beat the plaintiff, as charged in the declaration, and that such assault was a malicious, wanton, and aggravated one; and if the jury believe, from the evidence, that justice and the public good require it—then the law is that the jury are not confined in their verdict to the actual damage proved, but they may give exemplary damages, not only as a compensation for the wounded feelings of the plaintiff, but to punish the defendant, and to deter others from the commission of like offenses." *Simmons, J.*, said: "This charge was error because the jury had nothing to do with 'public good,' and had no right to so punish defendant by their verdict as to 'deter others' than the defendant 'from the commission of like offenses.' We think the exception made to this charge is well taken. Whatever may have been the dispute among text-writers and courts heretofore as to this question under consideration, the legislature has settled it in this State. It declares that in torts, when there are aggravating circumstances, the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. The judge, in his charge, did not confine the jury to the objects set out in the Code, but allowed them to consider whether 'justice and the public good' required additional damages, not only to deter the defendant from hereafter repeating the trespass, but 'to deter others from the commission of like offenses.' In our opinion, this was putting a heavier burden on the defendant than our law authorizes. This court reversed the court below upon a similar ground to this, and said: 'It is best that the law of the case, when expressed in the Code, be given as expressed in charge to the jury.'" Cited, 85/496.

697. Onus is on the plaintiff, and when this section should be given in charge.

The onus is on the plaintiff to prove aggravating circumstances in order to entitle him to have this section given in charge, and it should not be done where there is no evidence of aggravating circumstances in the act or intention, or gross negligence. But where there was proof of brutal and inhuman conduct on the part of the

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agent of the railroad company and of his employment by the company several days after the transaction, the section was properly given in charge. The prompt discharge of such an agent by the company upon being advised of his conduct, and the repudiation of his act would exclude altogether the right of the plaintiff to recover additional damages "to deter the wrong-doer from repeating the trespass," but would not prevent the jury from giving additional damages, "as compensation for the wounded feelings of the plaintiff." *Turner*, 72/292. Cited, 75/56; 102/476; 103/126.

In an action to recover damages for a personal injury, it is error requiring a new trial for the court to instruct the jury as to the right of a plaintiff to recover punitive damages where the tort complained of is accompanied by aggravating circumstances, when the evidence does not warrant a charge on this subject. *Evans, J.*, said: "Had the manner of the plaintiff been more gentle it is not improbable that the conductor would have been civil, if not equally courteous. If, as seems to be true, it 'was the plaintiff's fault that the conductor was out of tune,' the former can not complain of disrespectful treatment by the latter. *Peavy, supra*. A conductor has been judicially recognized as human. *Shropshire*, 101/36. And this court is committed to the doctrine that if a passenger is himself responsible for exciting the anger of an agent or employee of a railway company, whereby he is for the time being unfitted for performing the exacting duties he owes to his employer with respect to his treatment of passengers, the company can not be held accountable for improper conduct on the part of its servant. *Motes*, 117/923, 933." *Mason*, 123/773. Cited, 126/61. Reviewed and modified, 135/741.

698. When company is liable for servant's acts.

If a tortious act of a servant or agent be such, when committed in the business of the company and within the scope of the servant's employment, as would have subjected the servant to exemplary or vindictive damages had he been sued as principal, the company will be responsible for like damages, when it is sued for such misconduct in its business. *Gasway*, 58/216. Cited, 70/380; 72/294; 86/314; 102/476.

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699. If the jury may reasonably find there were aggravating circumstances, damages may be increased.

In *Drysdale*, 51/644, it appeared that there was a lumber-train loaded with lumber. It had a standard so forced out of an erect position that it reached a passenger-train as it passed and broke plaintiff's arm. He was trying to close a window in the ordinary and usual manner and there was some conflict in the testimony as to whether his arm projected out of the window. The agent in charge of the freight-train had observed the standard, but thought the cars could pass. It was held that when the jury may, from the evidence, reasonably find that there were any aggravating circumstances, such as gross negligence in the act whereby the injury was inflicted, they may increase the damages beyond a mere compensation for the injury done, and in such a case, where the judge who tries it, refuses a new trial, the damages given must be grossly excessive before the Supreme Court will interfere. Cited, 72/296.

700. Illustrations of the principles.

Where a passenger on a railroad-train, who had delivered his ticket to the conductor, was subsequently ejected by the latter, who took him by the arm, led him to the platform, and he thereupon got off, although this was done kindly, and he did not resist so as to require violence, yet the jury might find exemplary damages. The inconvenience, insult in the presence of fellow passengers and wounded feelings of the person ejected could be considered by the jury. Jackson, C. J., said: "All was done kindly, but by the commanding authority of the conductor. The passenger lost nothing by not resisting and requiring force to eject him. On the contrary, he was right to yield to authority and throw himself for remuneration upon the law. Of course, rude and violent conduct would be a circumstance to demand increase of damages against the company, but more than actual damage is recoverable for the act of putting off, by the mere moral force of authority, a passenger who had a ticket and was entitled to ride to Lithonia, before he got there." *Homer*, 73/251. Cited, 79/648; 86/644; 88/775; 105/317; 124/359; 6 G. A. 373.

The plaintiff purchased at night from the agent of the railroad company a ticket for passage over its road to Atlanta, paying for the same. When called upon, she presented this ticket to the conductor, but it appearing to be for passage to Asheville, North Caro-

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lina, he declined to allow her to proceed. She stated to him the circumstances under which she bought the ticket, and the fact that her trunk had been checked to Atlanta on it (which he subsequently ascertained for himself) and that she had no money with which to pay fare; but he ejected her from the train at a station where there were no accommodations, and from which she had to walk about two and a half miles to secure a place to lodge. She was an old and infirm colored woman, in bad health, and going to Atlanta on account of her husband's death. Held, a verdict in her favor for \$1,000 damages was neither contrary to law or evidence, nor excessive. The plaintiff having applied for the proper ticket, was entitled to rely upon the one delivered to her by the agent as the proper one, without examining it, there being no intervening circumstances requiring her to do so. The evidence was sufficient to authorize the giving in charge of §§ 4503 (3906), 4504 (3907) of the Code on the subject of aggravation and vindictive damages. *Dougherty*, 86/744, *Simmons, J.*, dissenting. *Dis.*, 120/915. Cited, 124/359.

In *Morse*, 102/302, in concurring, *Lumpkin, P. J.*, said: "*Dougherty's* case, *supra*, certainly goes quite as far as any court should ever go in holding that a railroad company should be held liable in damages for ejecting from its train a person presenting a ticket upon which he was apparently not entitled to ride. There the plaintiff had not entered into any special contract with the company, but had simply called for an ordinary ticket, and the agent had, by mistake, delivered to her 'a wrong ticket,' which she, relying upon the assumption that the agent understood his business, accepted without examination, being near-sighted and unable to read without her glasses, which she did not know whether she had with her on that occasion or not. This decision has not escaped criticism. In 9 *Harv. Law, Rev.* 353, it was said: 'The weight of authority is against it, and it seems to have no foundation in principle. It involves a misconception of the true character of a railroad-ticket.' And see 42 *Cent. Law, J.*, 117."

Where a person called for a ticket between two named points on a railroad, paid therefor, and received from the agent a ticket which was of a complicated character and not easily understood by persons unfamiliar with its use, and having started on his journey on board the passenger-train of the railroad, was ejected by the conductor before reaching his destination, on the ground that the ticket which he had did not entitle him to ride between those points, but in

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an opposite direction from his starting-point, he was entitled to recover damages therefor. He had a right, under his contract, to be on the cars and to ride the distance between the points the company engaged to carry him. He was entitled to proper evidence of the contract made with it, and his failure to receive it was no fault of his, but of the agent issuing the ticket, and the company had no right to eject him from the cars because of the want of such evidence. As to these matters, the agent and conductor were each the alter ego of the company. If the ejection was accompanied by circumstances of aggravation, such as the use of terms of insult and villification by the conductor, the refusal to put him off when the mistake was first discovered, but carrying him to the next station, from which point he had to proceed on foot, although old and lame, and his expulsion in the presence of others, he would be entitled to recover exemplary damages; and a verdict finding for the plaintiff the sum of \$1,000 was not so excessive as to require the grant of a new trial. *Olds*, 77/673. Cited, 79/361; 86/644; 102/476.

In *Bigelow*, 68/219, the plaintiff was wrongfully ejected from the car, the conductor claiming that plaintiff's ticket had expired, when in fact it had not. He recovered a verdict for \$1,750. *Speer, J.*, said: "Whether the action in ejecting plaintiff was a tort accompanied with aggravating circumstances, was a question for the jury, and exclusively within their province to decide, subject of course to the rule that they are not influenced by 'gross mistake or undue bias.' The night was cold, inclement and dark, and it had been raining and was then freezing. Without authority of law, and in violation of its contract, the plaintiff, an old man sixty-five years of age, was put off the cars, between the hours of nine and eleven o'clock at night, at no depot or stopping-place, with no shelter or accommodation at which to remain, and his only chance was to follow the track of the railroad, on which he was painfully injured by falling through a trestle. Taking all the circumstances together, we are not prepared to say that the damages were so excessive as to justify the inference of gross mistake or undue bias on the part of the jury. The plaintiff, thus ejected, was put in great peril, both as to life and limb, and under all the circumstances we think that he should be properly compensated in damages, not only to satisfy his own wrongs and injuries, but to deter the wrong-doer from repeating the trespass." Cited, 75/56.

In *Condor*, 75/51, it appeared that under the regulations of the

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road passengers were allowed to pass, even when the train was in motion, from one car to another whenever it was required by a necessary occasion, or whenever the passenger saw proper to do so, either for his convenience or pleasure. The plaintiff attempted to pass from the ladies' car to another car to get his baggage. The brakeman refused to allow it. An altercation ensued during which the plaintiff was assailed with coarse and vituperative language and blows by the brakeman, and probably by the conductor. The jury found for the plaintiff \$1,000. It was held that the plaintiff was entitled to recover something for the indignity put upon him by the opprobrious language used, and by the assault and battery inflicted by at least one of the employees of the company while he was in its care, and entitled to its protection, as a passenger in its case. Although there was no loss of time and no hindrance of the plaintiff in the pursuit of his business, and although there was no considerable amount of physical suffering occasioned him, yet he was subjected to indignity, his feelings were outraged, and he was degraded in the eyes of his fellow passengers by being assailed with coarse and vituperative language and blows by at least one of those who owed him protection and kind and hospitable treatment. In such a case, general or exemplary damages was the only compensation he could recover for this violation of his rights, and the measure of such damage is referred by express law to the enlightened conscience of an impartial jury. It does not appear that this finding was so excessive or exorbitant as to show that the jury were biased 'in favor of the plaintiff or against the defendant, or that they misconceived their powers or departed from their duties. Cited, 77/681 ; 102/476; 103/126.

In *Badenhoop*, 6 G. A. 371, it was held that as to the elements of damages recoverable by a passenger for an illegal ejection from a street-car, the facts of this case bring it squarely within the decision of the Supreme Court in *Baker*, 125/562 (54 S. E. 639, 7 L. R. A. (N. S.) 103, 114 Am. St. R. 246). Hill, C. J., said: "The Supreme Court, in *Georgia Railway & Electric Co. v. Baker*, 125/562, has held in explicit terms, in an analogous case, that general damages may be recovered as for an 'inexcusable trespass,' even though there be no aggravating circumstances in connection with the expulsion; that in such a case the damages may not only be compensatory, but punitive, and that § 4503 (3906) is applicable to the facts. This decision is in harmony with the previous de-

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cisions of that court on the same subject. *Homer*, 73/251; *Eskew*, 86/641 (12 S. E. 1061, 22 Am. St. R. 490); *Brauss*, 70/368."

701. Other conduct alleged as matter of aggravation.

When a petition in a suit by a passenger against a railroad company sets forth a complete cause of action for a failure to provide for the comfort of and to properly protect such passenger, allegations of other conduct on the part of the employees in charge of the train amounting to a similar failure of duty on the same trip may be properly alleged as matter of aggravation. *O'Bryan*, 112/127.

702. Intention of the conductor.

In *Eskew*, 86/641, the plaintiff had a ticket from Atlanta to Social Circle and surrendered it to the conductor. The conductor, through negligence, fell into an error as to the ticket, and expelled the plaintiff from the train at Conyers, an intermediate point. After the plaintiff alighted from the train, he remarked, in the presence and hearing of the conductor, "it was hard to be put off and be compelled to pay one's fare," to which the conductor did not reply. The court refused to allow the conductor to answer the question, "Whether or not it was his purpose to eject plaintiff from the train?" It was held that where punitive as well as compensatory damages are in question, the intention involved in the alleged tort is material. Whether the conductor intended to expel the plaintiff, or was misunderstood as to his purpose was relevant evidence on the claim for punitive damages. The conductor was competent to testify as to what his intention really was. In arriving at the conductor's intention, the jury could consider that he remained silent on hearing the plaintiff remark, after he alighted from the train, "that it was hard to be put off and be compelled to pay one's fare." Compensation for wounded feelings, as well as punitive damages, should be adjusted to all the circumstances of the actual case. Cited, 6. G. A. 373.

In *Hobbs*, 118/227, it was held that in view of the facts brought to light on the trial of the present case, it was erroneous to charge the jury upon the theory that the evidence warranted a finding that there were aggravating circumstances attending the tort alleged to have been committed upon the plaintiff by the defendant company. *Simmons*, C. J., said: "Exception was also taken to the following charge of the court: 'In every tort there may be aggravating cir-

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cumstances, either in the act or the intention, and in that event the jury may give additional damages.' It is a matter of grave doubt whether the plaintiff was entitled to recover anything at all; but be this as it may, no charge on the subject of aggravating circumstances should have been given. There was no pretense on her part that the conductor treated her harshly or discourteously, or with anything save polite consideration, when he discovered that she had been carried past the station and sought to make amends by promptly stopping the train and affording her an opportunity to get off. As to this phase of the case, it is controlled by the decision of this court in *Humphries*, 108/594, a similar case upon its facts, wherein it was held that mere negligent omission of duty on the part of a railway conductor does not call for punitive damages."

703. Punitive damages assessed without being claimed eo nomine in the declaration.

In order for the jury to assess punitive damages in an action for a tort, it is not necessary that they shall be claimed, eo nomine, in the declaration. It is enough that the facts alleged and proved be such as to warrant the assessment. *Holland*, 82/257. Cited, 120/458; 123/777. *Mason*, 123/773.

There was no error in allowing the plaintiff to testify that at the place where she was ejected from the car there was no protection for ladies or strangers, with reference to the police, although the absence of such protection was not alleged in the declaration. *Bleckley*, C. J., said: "The declaration did not allege that at the place where the plaintiff was ejected there was no police protection for ladies or strangers, but it was competent to prove this fact, not to show any negligence or misconduct on the part of defendant, but to show the actual condition in which the plaintiff was placed by the acts of negligence or misconduct which were alleged. The absence of police protection, though not imputable in any respect to any omission of duty on the part of the defendant, would throw some light on the mental distress and suffering which the plaintiff probably underwent when she was ejected, and immediately thereafter during the time she was obliged to remain alone in a sparsely populated and unprotected neighborhood. It surely can not be necessary to allege all the surroundings which may serve to aggravate an injury, in order to have them admitted in evidence at the trial." *Har- d- age*, 93/457. Cited, 116/783.

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There was evidence introduced in behalf of the plaintiff which warranted the court in charging the jury upon the subject of punitive damages. And as this evidence was admitted without objection, the court did not err in giving in charge the provisions of the Code, § 4503 (3906) notwithstanding the plaintiff did not in his petition specifically pray for a recovery of such damages. Owings, 97/664; Attaway, 90/659, and cases cited. Phillips, 119/146.

704. Evidence of defendant's having been fined admissible.

On the trial of an action for damages for an assault and battery, the defendant offered in evidence the record of a prosecution against him for the assault showing that he had been fined \$300 for the offense. It was offered to protect himself against the payment of exemplary damages. It was admissible for that purpose. By the imposition of the fine the defendant was punished, and the jury should not punish him again by vindictive damages. *Cherry v. McCall*, 23/193. But when the suit is by a widow for the homicide of her husband, the record of the acquittal of the defendant, under an indictment for the murder of the husband, is not evidence for the defendant in the civil suit. *Cottingham v. Weeks*, 54/275.

705. Expense of litigation.

The expenses of litigation are not generally allowed as a part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them. Code, § 4392 (3796).

706. When not allowed.

Where not only the liability of the defendant, but the correct measure of damages, is fairly open to controversy, and where the plaintiff has insisted upon too high a standard as to both, and thus forced the defendant to resort to a reviewing court, the case is not one for the allowance of counsel fees as a part of the recovery. Bleckley, J., says: "Where there is a bona fide controversy for the tribunals to settle, and the parties can not adjust it amicably, there should be no burdening of one with the counsel fees of the other, unless there has been wanton or excessive indulgence in litigation." *Tift v. Towns*, 63/237.

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707. Must be proved in order to recover.

In order to recover for expenses of the litigation, the proof must show what the expenses were, and they are only recoverable where the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. *Mayor and Aldermen of Savannah v. Walden*, 49/316. Cited, 128/819.

The discretion allowed the jury in this section is not as to the amount, but as to whether from all the facts and circumstances disclosed on the trial, they will allow any expenses of litigation at all. If they are allowed the amount must be proved by testimony. *Johnson*, 90/810.

708. Necessary expenses.

In all cases, necessary expenses consequent upon the injury done are a legitimate item in the estimate of damages. Code, § 4505 (3908).

In *Crawford*, 130/421, which was an action to recover damages done to an automobile, it was held: Nor, under the facts of the case, was it error requiring a reversal that the court charged that, if the jury found that the plaintiff was entitled to recover, he would be entitled to recover such amount as the jury should determine was reasonable and necessarily incurred as expenses as the direct and proximate result of the collision. Where, in an action to recover damages for a personal injury, the plaintiff alleged that she was entitled to recover "for pain and suffering, for doctor's bills and medicine," but on the trial no evidence was introduced to prove any amount of expense incurred for doctor's bills and medicine, it was error for the judge to charge, that, as to the "damages of the kind sued for in this case," there is no measure fixed by law but the amount is left to be determined by the enlightened conscience of impartial jurors, where he did not instruct the jury that the suit for doctor's bills and medicine had been abandoned, or that these items were not included in the expression, "the kind sued for in this case," to which the rule of measurement announced in this charge was made applicable. *Davis*, 132/812.

Where the injured person was confined to his home for several weeks and then returned to work, though there was some evidence to indicate that he continued to suffer, and where some months later he had a spell of sickness, and about a year thereafter he again became sick and died, it was not competent to prove the amount

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of the physicians' bills incurred in the two spells of sickness, unless it were shown that they resulted from the injury. *Gilleland*, 133/621.

In *Broughton*, 128/814; it was held that when there is no evidence upon which a recovery for a particular element of alleged damages could lawfully be based, the judge should not submit to the jury the question of the plaintiff's right to recover for such element of damages. *Fish, J.*, said: "There was no evidence at all as to the reasonableness of the amounts which the plaintiff paid the different physicians who treated her. Indeed this was not to be expected when she failed to state what these respective amounts were. Undoubtedly a plaintiff who is entitled to recover damages for a physical injury may recover, as a part thereof, reasonable physicians' bills incurred in consequence of the injury; but, in order to recover for such expenses, there must be proof of a definite nature as to the amount so expended, and also some evidence as to the reasonableness of such amount. As was said in *Mayor of Savannah v. Waldner*, 49/316, 324, 'a plaintiff can not claim for what is capable of almost exact proof, without furnishing the jury some testimony to arrive at the measure or amount of the claim. Proof of what are the physician's bill, and other expenses growing out of damage received, is always required to entitle a recovery therefor. In *Allen v. Harris*, 113/107 (4), it was held: Proof of what was paid for professional services is not, without more, sufficient proof of their value. As, under the evidence, there could be no lawful recovery by the plaintiff for what the judge termed 'medical bills and medical expenses,' it was erroneous for him to instruct the jury that if they believed, 'from the evidence in this case that the defendant is liable to the plaintiff, and that the plaintiff was injured and it became necessary for her to incur medical bills and medical expenses, * * * the defendant would be liable to her for reasonable expenses in securing medical attention,' etc."

Where in such a suit no claim was made for physician's bills, or for exemplary or punitive damages, and there was no claim that the injury was maliciously inflicted, it was not competent to show that the defendant had paid the physician's bill of the plaintiff, or had furnished groceries to him, there being no counter-claim or issue made by the pleadings in regard to such subjects. *Holland v. McRae Oil & Fertilizers Co.*, 134/678.

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709. An improper charge.

In *Varner*, 108/813, it was held that it was, in the trial of an action against a railroad company to recover damages for personal injuries, material error against the plaintiff for the judge, who had given otherwise a proper charge to the jury, to incorporate therein the following: "In this case, gentlemen, or in any other where you want to give somebody something as a gift, you take it out of your own pocket and not out of the pocket of some one else; and, where you want to disregard somebody's rights, disregard your own rights. In other words, let's have fair play about it." As the plaintiff was seeking to obtain a verdict against the defendant, and the defendant was seeking to prevent a recovery, the language used was susceptible of the construction by the jury that a verdict for the plaintiff would be a gift by them of some part of the defendant's property to the plaintiff. *Simmons*, C. J., dissenting.

710. Damages for injuring and killing stock.

In *Hudson*, 62/679, it was held that compensation in damages for hurting and wounding a farm-horse, whereby he was temporarily disabled for service in the season of farm labor, includes reasonable hire for the time during which the disability continued, as well as making good any diminution in his market value occasioned by the permanent effects of the injury. *Bleckley*, J., said: "A limit, as to the amount to a sum not exceeding the full value of the animal, with interest thereon, would seem proper. The limit is reasonable because the capital invested in the property is destroyed in so far as the injury has diminished its value, just as the whole capital would have been destroyed if the animal had been killed outright; and the accident that life was spared ought not to subject the wrong-doer to make a larger compensation in the aggregate than if death had immediately ensued." Cited, 63/242; 122/551; 8 G. A. 112.

The suit of *Tift v. Towns*, 63/237, was brought for damages sustained by reason of a wagon and team being precipitated into *Flint River* whilst crossing the toll-bridge. The team consisted of four horses. One was but slightly injured, another was damaged to its full value, and the other two were damaged unequally. The wagon was used for plantation purposes, not for hiring out, and the owner had other animals from which to make up a team and do the customary hauling. The court admitted evidence going to show the hire

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of the wagon and team, and the cost of a hand to attend to them while they were disabled from work. The testimony was not relevant and should have been rejected. Bleckley, J., says: "When a person keeps a wagon and team for hiring out, to break up the team or disable it, is to cut off the income which would result from such hiring. But in this case, the use was alone for plantation purposes, and the plaintiff had other animals from which to make up a team and do the customary haulings. Moreover, the four horses were damaged unequally. With this inequality, to keep them grouped as a team, and to charge him for them as such is to make a forced computation of the damages, especially in view of her preparation for supplying their places as a team from other animals on the plantation. The cost, if anything, of making this change in the constitution of a necessary team for the accustomed hauling would be an item of the damages. The hire of the horse, which the injury rendered totally valueless and unserviceable, was not recoverable on any basis. As to hire, the investment was at an end, and there was nothing to do but to pay for him in full, and thus replace the destroyed capital, with interest, to be invested or not in other property at the owner's discretion."

In a suit for damages resulting from killing live stock, where the only issue for trial was the value of the stock killed, the last original return of the property for taxes made by the plaintiff, specifying the amount for which the property was given in, was admissible in evidence against the plaintiff as a circumstance for the jury to consider in passing upon the issue submitted. Simmons, C. J., said: "These returns were objected to by the plaintiff, on the ground that they were his original returns, and were not signed by the tax-receiver. The objection was sustained, and the returns excluded. We do not understand what was meant by the plaintiff in his objection that the returns were original—whether they were upon the form of return furnished by the tax-receiver to the taxpayer, or whether it was the return digested by the tax-receiver and filed by him in the proper office as required by law. If the latter, this evidence was clearly admissible, because the presumption is that the receiver did his duty, and required the plaintiff to swear to the correctness of his returns before they were placed upon the digest. If the former, it was still competent evidence and admissible. It was at least an admission in writing by the plaintiff as to the value of the stock, and was, as such, admissible, whether signed by the tax-receiver or not. This evidence was not, in any sense, conclusive as to the value of the

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property, but it was admissible as a circumstance for the jury to consider in passing upon the credibility of the plaintiff's testimony and in seeking to arrive at the value of the stock killed." *Tharp*, 104/560.

In the trial of a suit against a railroad company for damages sustained by the killing of a horse, it is not error to exclude evidence offered by the defendant, to the effect that the witness had seen good mules sold for a sum less than the amount claimed by the plaintiff for his horse, and that such mules had within two or three years been sold for a much larger sum, and that he had also seen other horses and mules sold at the same rate, it not appearing at what place the sales occurred; such evidence being offered as original evidence to show the value of the horse in question, and not as reasons of the witness for the opinion given as to the value of the horse. *Calhoun*, 104/384.

In an action against a railroad company for damages for killing one mule and injuring another, it was not error to allow the plaintiff to testify as to the expense of feeding and doctoring the crippled mule during the time it could not work, as a measure of damages touching that animal. *Warren*, 84/329.

Where the court charged the jury that the measure of damages for an injury to a horse was the difference between his value before the injury and his value after it, and also that speculative damages could not be recovered, the failure to charge a request as to a particular class of speculative damages is no cause for a new trial. In this case defendant's counsel requested the court to charge the jury that, if plaintiff's estimate of the value of the horse and of the amount of the damage was based upon the idea that he hoped or expected to get a premium for the horse by putting him on a race-track, such damages would be too speculative, and plaintiff could not recover. *Herman*, 92/384.

In *Warmack*, 86/351, the declaration alleged that the defendant's train collided with the plaintiff's wagon and team and demolished the greater part of the wagon and badly crippled the four mules used with the wagon. The court admitted proof of the value of the hire of the mules. It was objected to on the grounds that it was illegal and was not declared for. It was held that the admission of this evidence, if error at all, was not such error as would give the company a right to complain, it not appearing that the jury allowed any damages for such loss of hire, and the amount of

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damages found being fully authorized by the evidence as to the injury to the wagon and the mules, which damages were sufficiently alleged in the declaration.

This being a suit for the recovery of damages, and the evidence upon the question of the amount that the jury should find for the plaintiff, in the event their verdict was in his favor, not being such as to limit them absolutely to any one given sum, it was the duty of the court to charge the jury the law as to the measure of damages; and the failure to do so was error. Hughes, 127/593.

Where a horse has been temporarily totally disabled for work, and also permanently injured, the measure of damage is the diminution in the market value of the horse caused by the permanent effects of the injuries, the reasonable hire of the horse during the period of temporary total disability, and the cost incurred in keeping and treating the horse for the injuries, the aggregate of these amounts not to exceed the value of the horse before the injury, with interest thereon. Stearnes, 8 G. A. 111.

In Wallace & Co., 122/547, the court charged, "In addition to the actual injury to the property, the plaintiffs allege that during a period of four months they were engaged in an effort to cure the horses and restore them to soundness, and that during that period they actually lost a dollar a day, the total sum being \$240. You will look to the evidence and ascertain what the truth is in regard to that specification of damages; if it is sustained by the evidence, it would be a legitimate item to be allowed in their favor. It was held that the charge as to the right to recover for the hire of the animals injured, while abstractly correct, was harmful to the defendant, in that the jury were not instructed that they could not in any event allow more for injury and loss of hire than the sound value of the horses at the time of the injury.

The value of a dog [so killed or injured] may be proved as that of any other property, by evidence that he was of a particular breed, and had certain qualities, and by witnesses who knew the market value of such animal, if any market value be shown. Woolfolk, 128/631.

711. Damages for negligence causing the burning of timber, fences, etc.

The case of Murray, 93/256, was brought to recover damages resulting from a fire caused by an engine. The defendant's counsel

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requested the court to charge "that the true test of the damage done to the trees and timber on the land of the plaintiff, leaves, grass, and litter on the land (not including rails in the fence), is the difference in the value of the land just before the fire and its value just after the fire; and if the value of the land was not diminished by reason of the injury to the trees, timber, leaves, grass, and litter by the fire, then the plaintiff is not entitled to recover anything on account of the injury by the fire." Error was assigned on a refusal to give the charge, and it was held that where growing timber, much of it young and immature, is destroyed by fire as a consequence of a negligent tort, and there is no depreciation in the market value of the land by reason of the destruction of the timber, the measure of damages is the value of the timber destroyed in its then state as attached to the land on which it grew, which value is to be ascertained by evidence as to what the owner of the premises could, under all the circumstances, have realized from the timber destroyed, by appropriating it to use himself, to the extent of any demand for it made by his own wants at and about the time of the fire, and by selling it to others to the extent of any demand for it which then existed; the value to be reckoned at the worth of the timber as it stood upon the land when it was destroyed, not computing anything additional thereto for the increase which would have resulted from severing it from the realty, removing it to the place of use or sale, and putting it in condition to be used or sold. Timber injured by the fire, but not destroyed, is to be dealt with on the same basis, to the extent of the difference between its value as it was before the fire and as the fire left it. For leaves and trash which the fire consumed there could be a recovery to the extent that the owner could have used or disposed of the same in supplying any demand then existing or near at hand, the measure being the value of the raw material as it lay on the ground, not including in the quantity to be paid for any of the material which could not have been used or sold to supply the demand then existing, or which arose soon thereafter. For material which, had it not been destroyed, would have been mere waste in the woods, there can be no recovery. For fencing injured or destroyed the recovery should be measured by the cost of restoring it and making its condition as good as that in which it was when injured or destroyed. This case again, 97/326.

In Ward, 110/793, it was held that negligence causing the burning of a pasture fence does not entitle the owner to recover from the

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wrong-doer the value of the pasture for use and occupation for a longer period of time than would be reasonably necessary to replace the fence. An allegation, in a petition for the recovery of damages alleged to have been caused by the negligent setting out of fire upon the plaintiff's premises, that he was "forced to call in his neighbors and friends to assist him in checking the fire so set out, in order to save his residence from total destruction, for which labor and service petitioner is entitled to" a specified amount, is without merit. Cobb, J., said: "It is not alleged that he has paid his neighbors and friends anything for the services rendered by them, nor is it alleged that he is in any way liable to them. The allegation, taken literally, bears the construction that plaintiff claims the amount stated for the mere act of summoning his neighbors and friends to the fire."

Where there is a diminution in value of land caused by the negligent firing and destruction of growing timber thereon, the measure of damages is the diminution in the market value. In cases where growing timber, much of which is young and immature, is destroyed by fire as a consequence of a negligent tort, and there is no depreciation in the market value of the land by reason of the destruction of the timber, the measure of damages is the value of the timber destroyed in its then state as attached to the land on which it grew. Both of these principles may be charged in the same case, if the facts are such as to warrant it. Tate, 129/526.

The measure of damages for the negligent firing and destruction of the fencing and ornamental trees on the plaintiff's land by the railroad company in the operation of its train was the diminution in value of the premises resulting from the injury caused by such firing. The charge of the court could not have been reasonably misunderstood by the jury as presenting a different rule. Kohlrup, 124/250. Cited, 129/531.

The refusal of the court, upon written request, to charge that the jury were not bound by the valuation of the property as testified to by witnesses was not hurtful to the defendant, when the jury found for the plaintiff much less than the estimated value of the property according to the testimony of any witness. Sumner, 134/673.

While proof of the cost of an article or thing is not the criterion of its value, yet such evidence is admissible as a circumstance in an inquiry instituted to ascertain that value. Williams, 113/335.

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712. Plaintiff bound to lessen damage.

Where by a breach of contract or negligence one is injured he is bound to lessen the damages as far as is practicable by the use of ordinary care and diligence. But this does not apply in cases of positive and continuous torts. Code, § 4398 (3802).

If a passenger was injured by the negligence of the railroad company, he was bound to lessen the damages as far as practicable by the use of ordinary care and diligence. But it would be error to charge that it was his duty to do some particular thing for that purpose. *Cunningham*, 123/90.

713. Illustrations of the rule.

In an action against a city to recover damages for personal injuries caused by its negligence in permitting a hole to remain in its sidewalk, it was held to be a sound principle of law, that it was the duty of plaintiff to use reasonable means to effect as speedy a recovery as could reasonably be effected under all the circumstances, and that if she negligently failed to do so, and negligently failed to secure the services of a physician in reasonable time, and her injuries were aggravated thereby, she could not recover for such aggravation. *City of Atlanta v. Alexander*, 80/637. Cited, 112/727.

A person upon whom a wrong has been committed is under obligation to lighten the consequential damages as much as he can by the use of ordinary care and diligence. To the extent in which his damages are increased by his failure to observe such care and diligence, they are the result of his own negligence. This applies, in case of an expelled passenger, to the time and mode of travelling from the place of his expulsion to the station at which he was entitled to be set down. It applies also to fatigue, hardship, and injury to his health involved in reaching there. Though he could not be compelled to pay fare to avoid wrongful expulsion, after being expelled he could not recover damages for walking, and its consequences, when he might have reached the station more cheaply and expeditiously, and with less injury to his health, by riding on the same or a subsequent train, or by securing other conveyance; nor, as a general rule, could he recover for inconvenience, hardship, or injury to health originating after reaching the station to which he was entitled to be carried or needlessly caused by walking and exposure before reaching there. *Eskew*, 86/641.

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In *Usry*, 82/54, it appeared that Mrs. Usry in alighting from a train was injured so that miscarriage ensued. After receiving the injury she was taken in a buggy over a country road three quarters of a mile to her home. It was held that it was a question for the jury whether, after receiving the injury, the woman could, consistently with ordinary prudence, undertake a short journey to reach her home, rather than remain at the station, and take immediate precautions to obviate the threatened consequences.

The court did not err in overruling the special demurrer to that paragraph of the petition which set forth the means adopted by the plaintiff to mitigate her suffering, it being competent for her to allege and prove that she resorted to the expedients in her power to avoid or lessen the injuries resulting from the alleged negligence of the defendant. *Powell*, 127/805.

714. Discretion of jury as to damages.

The question of damages being one for the jury, the court should not interfere unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias. Code, § 4399 (3803).

Despite the broad discretion of the jury in assessing damages in cases of personal injury, the trial judge may grant a motion for a new trial on the general grounds when, in his opinion, the verdict is unreasonably too large or too small; and this court will interfere with that discretion only in cases of manifest abuse. *Holland v. Williams*, 3 G. A. 636; 6 G. A. 376.

The court has no power to review the finding of the jury because their verdict is claimed to be excessive, unless it appear that their finding was due to prejudice or bias, or was influenced by corrupt means. *Murphy v. Meacham*, 1 G. A. 155. Cited, 6 G. A. 174.

In an action for a homicide, in determining whether the verdict is excessive or not, the question will not be decided by reference to the deceased's expectancy according to the mortality and annuity tables alone. A verdict will not be set aside as excessive when it is not so large as to justify the belief that it is the result of bias or gross mistake. *Minor*, 2 G. A. 804.

A verdict of a jury can not be held to be excessive unless it be

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manifestly the result of prejudice or bias, or other corrupt motive. *Merchants & Miners Transportation Co. v. Corcoran*, 4 G. A. 654. Cited, 6 G. A. 174.

The verdict was authorized by the evidence; and the recovery can not be set aside upon the ground that it was excessive, inasmuch as no showing is made that it was induced by prejudice or bias, or by corrupt means. *Wright*, 6 G. A. 172.

In *Miller*, 5 G. A. 402, it was held that a verdict in one of that class of cases in which the amount of damages is left to the enlightened conscience of the jury is not to be declared by a reviewing court to be excessive, unless it is so large in amount as to justify the court in believing that it could not reasonably have resulted from any other cause than bias or gross mistake on the part of the jury. *Powell, J.*, said: "Miller sued the railway company for damages resulting from a negligent injury, in which both of his legs were cut off. He recovered a verdict of \$25,000, which the trial judge expressly approved, as being, in his opinion, not excessive under the circumstances. In this court it was practically conceded that the evidence was such as to authorize the jury to find that the defendant was negligent, and that the plaintiff was entitled to recover in some amount, the chief insistence being that the verdict is excessive. At the time of the injury the plaintiff was twenty-one years old, was a locomotive fireman, and was earning \$1.75 per day. He experienced great pain and suffering. * * * We have scanned the record before us with care. The trial was lengthy, the evidence was voluminous; and yet there is not a single exception taken either to the admission or the rejection of testimony. There are a few exceptions to the charge of the court, but none of them are meritorious. The charge was full, fair, and comprehensive. Nothing, save only the size of the verdict itself, suggests the slightest possibility of the introduction of bias or mistake into the jury box. On the hearing of the motion for a new trial, the whole record was before the trial judge; and, not merely by that implied approval which would arise from the act of refusing the motion, but in an opinion filed, he has expressed himself as being satisfied that the verdict is not too large. The jury saw the plaintiff, heard his agonies described, probably considered, as they had the right to consider, that he would suffer in the future and would endure 'mortification and anguish * * * by reason of the mutilation of his body and the fact that he may become an object of curiosity or ridicule among his

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fellows.' (See *Heddles v. Chicago Ry. Co.*, 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106, in which a boy was given \$18,500 for the injury of having his legs cut off, and the verdict was sustained.) We recognize that the verdict is larger in amount than any of the juries in this State have previously awarded for personal injuries, so far as the reports show; but this was perhaps as serious an injury as has ever been before the courts of this State. It must be remembered, too, that owing to the low purchasing power of money at the present time, every dollar awarded a few years ago afforded as much compensation as do two dollars now. After mature deliberation, we are unwilling to say that the verdict was the result of bias or mistake." Cited, 132/863.

In an action for damages for personal injuries, as a general rule, the amount of damages is a question for the jury. But if the evidence authorizes a recovery by the plaintiff, and the verdict finding in favor of the plaintiff's right to recover fixes such a small amount of damages as will justify the inference of gross mistake or undue bias, a new trial should be granted. Under the evidence submitted in this case, a verdict in favor of the plaintiff for \$100 was so small as to require, under the rule above stated, the grant of a new trial. *Anglin v. City of Columbus*, 128/46.

715. Explanatory.

Although the amounts of verdicts in other cases can not be considered by a jury in fixing damages in a particular case, and although previous verdicts are of no great value as precedents, still they may be of some value as illustrations of the general rules controlling the courts when acting on motions to set aside verdicts for excessive damages. And they are of some interest as showing the general course of the juries and courts on the subject. For these reasons, but with some hesitation, brief statements of nearly all the cases are here given. It was not practicable, nor was it desirable, to make a complete statement of the facts in each case. In each instance enough has been given to show the general character of the case.

716. Other verdicts as precedents.

In *Lyon*, 89/16, Lumpkin, J., said: "It is needless to cite the numerous cases in which verdicts for large amounts have been ren-

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dered in cases more or less similar to the present one, or to point out the instances in which they have been allowed to stand, or have been set aside. As each case must at last depend on its own peculiar facts and circumstances and be tested with reference to the same, precedents of the kind referred to are of no great value."

Decisions of the Supreme Court touching particular amounts awarded by other juries in other cases as damages, and touching the question whether such awards were excessive or not excessive, should not be considered by the jury in fixing the damages to be allowed by them in the case on trial. King, 88/443.

717. General rules.

In *Owens v. Sanders*, 44/610, it was held that a new trial will not be granted only because a verdict is too small in trespass vi et armis, unless it is shockingly against the evidence. Owens sued Sanders for beating him. The jury found a verdict for \$30.00. For error on the trial it was set aside.

The question of damages is one for the jury, and the judge should not interfere with the verdict as excessive in amount unless the damages found are so excessive as to justify the inference of gross mistake or undue bias. This court will be more reluctant to interfere with a verdict as awarding excessive damages, where the point was not distinctly made in the court below but was brought up under the general exception that the verdict was contrary to law and evidence. Neel, 68/609.

Whilst this court will always be careful to protect railroad companies against excessive damages, still when from gross negligence the lives and safety of passengers are exposed to danger, and injury results therefrom, it will not interfere with the finding of a jury except when it is apparent that the verdict was the result of passion or prejudice. Boring, 51/583.

Courts will interfere cautiously with the verdicts of juries in cases of *tort* merely on account of the excess of the damages. They will nevertheless, set them aside, and send the case back for the consideration of another jury, when the amount is so extravagantly large as to leave no room to doubt but that the jury were governed by passion, prejudice, partiality or corruption. Winn, 26/250. In this case there were two concurrent verdicts for \$7,000. This question was made on the second trial, and it was not set aside. Benning, J., dissenting.

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In Dorsey, 68/228, it was ruled that, whilst the court will never invade the province of the jury in weighing testimony, yet it would not hesitate to set aside a verdict in a case involving vindictive damages, where there was reason to suspect that the same was the result of bias in favor of one class of suitors, or prejudice against another class.

In King, 88/442, the plaintiff sued for damages, because, having paid his fare over defendant's road from Brunswick to Atlanta, and taken passage upon one of its trains, after the train left Macon a new conductor, who had taken charge of the train at Macon, demanded payment of fare from Macon to Atlanta and although he (plaintiff) submitted to such conductor such proof that he had paid his fare and purchased his ticket as was at his command, the conductor threatened to stop the train and eject him, and compelled him to pay fare from Macon to Atlanta, etc. He obtained a verdict for \$500. It was held that the evidence warranted a finding for the plaintiff; and, though the amount of the verdict is extreme, it is not so excessive as to require this court to set it aside, over the approval of the trial judge. Lumpkin, J., dissenting.

In Lanier, 83/587, the plaintiff was a car-coupler. His left hand was crushed, causing the loss of his second and third fingers, and injury to his first. He was thirty-two years of age, and was receiving \$45.00 per month at the time of the injury. He received a verdict for \$4,000. Blandford, J., said: "The damages, it is true, are quite large. They go to the extreme limit, if, indeed not beyond it; and in all such cases as this the exercise by the courts trying the cases of their discretion to grant a new trial would, it seems to us, be eminently proper. While this court rarely interferes with the discretion of the court below in granting a new trial, or refusing to grant a new trial, on the ground of excessive damages, yet this court has the power so to do, and will not fail to exercise it, in a proper case. If parties wish to hold their verdicts in actions of this character, they should see to it that the verdicts are reasonable, and not such as to shock the moral sense. But we do not grant a new trial in this case, although strongly tempted to do so, on account of this verdict."

The cause of action being traceable to a mistake of the conductor, and not to his willful or intentional violation of the plaintiff's rights, a verdict for \$750 damages has the appearance of being excessive, under all the facts and circumstances in evidence. Eskew, 86/641. Cited, 98/684; 95/243.

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In *Harrigan*, 80/602, it was held that a new trial should be granted for a manifest error, though a minor error of law, where the general merits of the case as one for recovery at all are doubtful, and where the damages found are apparently excessive. The error in this case was in allowing the plaintiff, when testifying in his own favor, to say as part of his evidence, that his character for truth and veracity had never been attacked, and that he boarded with Kennedy, the tailor, who could testify to his good character. See this case again, 84/793.

In *Lowry*, 83/512, the plaintiff was a boy nine years of age. He lost an arm and recovered a verdict for \$13,750. It was held that, the damages found being extreme, if not excessive, the error of the court in charging the jury on that branch of the case is cause for a new trial; the error being in referring the jury to certain elements of damages as to which there was no evidence, such as habits, avocation, money made by labor, prospect of increased earnings, prospects of obtaining steady and remunerative employment, etc., the person injured being a child nine years of age.

718. Writing off a portion of the damages.

Where general damages have been recovered for a personal tort, if they are so excessive as to lead the court to suspect bias or prejudice, he may grant a new trial; but the judge has no power to say that the verdict in such a case should not exceed a specified sum, and to require the plaintiff to write off a portion of the damages, and thereupon refuse a new trial. Aliter, in actions on contracts or for torts to property, the value of which may be ascertained, and in relation to which fixed rules for measuring damages are recognized. Hall, J., says: "In 10/45, *Lumpkin, J.*, declared excessive damages to be good cause for granting a new trial, and that the discretion of courts may be properly exercised in this respect in two cases: One where the law recognizes some fixed rules and principles in measuring the damages, whence it may be known that there is error in the verdict, as in actions on contracts or for torts done to property, the value of which may be ascertained by evidence. The other includes suits for personal injuries, where although there is no fixed criterion for assessing damages, yet the court must conclude, from the exorbitancy of them, that the jury acted from passion, partiality, or corruption. This case furnishes the text of § 4399 (3803) of the Code and that includes both classes

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of cases in which damage may be given, and prescribes the ground upon which the court may rightfully interfere with the verdict, in the first class of cases, where there has been gross mistake, and in the second, where the finding has been so excessive as to justify the inference of undue bias. In the first instance named, it is an easy matter to correct any excess in the verdict by directing a portion of the same to be written off, for there the law recognizes fixed rules and principles for measuring the damages, and the evidence accurately ascertains what amount shall be found. But in the last from the very nature of the case, it is impossible to lay down any such fixed rules and principles; and in every such case the amount of the finding must be largely in the power of the jury, who have no other guide but their enlightened consciences. To say, therefore, in such cases, that this finding shall not have exceeded a certain sum, is to invade their peculiar province and to assume their functions." Harper, 70/119. Cited, 104/659; 91/821; 78/320; 112/933; 129/797; 3 G. A. 638. Where the tort was to property. 76/217.

In Brunswick Light, etc., Co. v. Gale, 91/813, a married woman sued for damages for personal injuries. There was a verdict for \$10,000. The judge ordered a new trial unless the plaintiff would write off \$2,500. That they did, and the company excepted to the refusal to grant a new trial. It was held that the court having determined that the ground in the motion for a new trial complaining that the damages found by the jury were excessive was well taken, it was error not to grant a new trial unconditionally, there being in the evidence no guide or criterion by which the court could determine the amount which should be written off. Simmons, J., said: "In a case of this kind, as we have said, where the action is for a personal injury and for pain and suffering resulting therefrom, and there are no other elements of damage for which a recovery can be had, such as loss of earning capacity, etc., there is no guide or criterion by which the amount of damages may be measured except the enlightened conscience of impartial jurors. There is no criterion, therefore, by which the court can estimate the proper amount of damages, and he has no power to reduce the verdict by ordering a certain amount written off. If the verdict is so excessive as to cause him to suspect bias or prejudice, he can set it aside, and order a new trial before another jury; but he must do this unconditionally. In actions on contracts, or for torts to property, in re-

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lation to which some fixed rules for the measure of damages are recognized, he may order a certain amount written off; and in an action for the homicide of a person, where the value of a life may be shown, according to certain recognized rules, he might perhaps have power to reduce an excessive verdict to an amount which would be proper under the proof." Cited, 104/659; 112/934.

Where, pending a motion for new trial by the defendant to set aside a verdict for damages consequent upon personal injuries received by the plaintiff, the latter, by his counsel, voluntarily, and without any suggestion from the court, reduced the verdict by writing off therefrom a certain sum, and the trial judge subsequently overruled the motion, but it does not appear that his refusal of a new trial was influenced by such reduction of the verdict, and where this court can not say that the verdict as originally rendered by the jury was so excessive as to lead the court to suspect bias or prejudice on the part of the jury, the judgment of the court refusing a new trial will not be reversed on account of such voluntary reduction of the verdict. Lewis, J., said: "The rule in this State being, that where general damages have been recovered for a personal tort, if they be so excessive as to lead the court to suspect bias or prejudice, the judge has no power to require a portion of the damages written off, and therefore refuse a new trial; otherwise, where the damages claimed are special, and from the testimony can, with some accuracy, be computed in dollars and cents as in cases of tortious homicides." Godkin, 104/655. What was said in the cases above by Justice Simmons and Lewis as to power of the judge to reduce a verdict in cases of homicide is obiter. Perkerson, 112/934. Cited, 133/77.

In Crosby, 74/737, it was held that where, in a suit by a wife for the homicide of her husband, who was a railroad employee, the Carlisle tables of mortality were introduced in evidence and the value of the services of the deceased proved, thereby furnishing a measure of damages, and after a verdict for the plaintiff for \$12,000 and pending the motion for new trial, counsel for plaintiff voluntarily wrote off from the verdict \$2,000, so as to come within the measure of damages proved, the refusal of a new trial was not error. Counsel for the plaintiff could write off any part of the damages recovered, and the defendant could not complain, because it was not hurt by making the judgment less. Jackson, C. J., dissented, and stated that the other judges held that this case was not controlled by Harper, *supra*, inasmuch as the Carlisle table of the

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expectancy of life fixes a recognized criterion for measuring damages when used in connection with the annual proceeds of the husband's labor, and that as damages could be measured by this criterion, and as counsel had the right to write off any part of the damages, and the railroad company could not complain because not hurt by making verdict against it less, they hold the company not entitled to a new trial on this ground. Cited, 91/821; 104/659; 112/934.

The case *Glover*, 92/132, was an action by a mother for the killing of her son, and the jury found a verdict for \$7,733.98. It was alleged to be grossly excessive. After argument of the motion for a new trial, but before any decision on the motion, the plaintiff's counsel voluntarily wrote off \$905.02. *Bleckley, C. J.*, said: "We can see no objection to allowing plaintiff to write off from her recovery voluntarily any sum whatever. If, by so doing, any excess of damages found by the verdict is voluntarily relinquished, it would seem that the amount of the verdict would no longer be a cause for a new trial. Why should there be a new trial solely for the purpose of reducing the damages, when the plaintiff had voluntarily relinquished all that could be treated as excess?" Cited, *Mayor, etc. v. Tucker*, 103/234. In this latter case the verdict as originally returned by the jury was for an amount which was unauthorized by the evidence, but as the plaintiff voluntarily reduced it to an amount which was authorized by the evidence, there was no error in overruling the motion for a new trial. It was an action to recover damages for injury to land. Cited, 129/799.

In *Perkerson*, 112/923, it was ruled that the trial judge had no power to order that, as a condition to the refusal of a new trial, a portion of the verdict shall be written off as excessive, except where, from the application of the law to the evidence, the excess can be accurately ascertained. *Fish, J.*, said: "After mature consideration, we are of opinion that, upon principle, the rule denying the power of a trial judge to order a remittitur as a condition to the overruling of a motion for a new trial in actions for personal injuries should apply with equal force to an action for a tortious homicide, and, indeed, to all cases where by the application of fixed principles of law to the evidence the excess in a verdict can not be accurately ascertained." Cited, 129/798; 3 G. A. 638.

The trial judge has no power to order that, as a condition to the refusal of a new trial, a portion of the verdict shall be written off as

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excessive, except where from the application of the law to the evidence the excess can be accurately ascertained. Chastain, 122/250.

In Randolph, 129/796, it was held that, where, in a suit by a widow for the homicide of her husband, a verdict was found in favor of the plaintiff for \$9,127.20, and the presiding judge, on the hearing of a motion for a new trial, expressed his disapproval of such verdict as being for too large a sum, and stated that he would not approve a verdict in favor of the plaintiff for exceeding \$6,500, whereupon the plaintiff's attorney wrote off all in excess of that amount, and the judge then passed an order reciting, that, "it appearing" that the plaintiff had voluntarily reduced the verdict and judgment in her favor, and had written off all in excess of \$6,500, the motion was overruled, under previous decisions of this court this was error which necessitates a reversal. After reviewing the decisions of the Supreme Court on the subject, Lumpkin, J., said: "In Perkerson, 112/923 (38 S. E. 365, 53 L. R. A. 210), suit was brought by a widow for the homicide of her husband. Proof was made as to his earnings, and the mortality and annuity tables were introduced in evidence. The jury returned a verdict in favor of the plaintiff for \$10,833.33. The defendant moved for a new trial. The motion was overruled except as to the ground complaining that the verdict was excessive, upon which ground the judge ordered that a new trial be granted unless the plaintiff should write off from the verdict a designated amount. The plaintiff complied with the requirement; and a new trial was thereupon refused. The defendant excepted. This court held that 'The trial judge has no power to order that, as a condition to the refusal of a new trial, a portion of the verdict shall be written off as excessive, except where from the application of the law to the evidence, the excess can be accurately ascertained.' In the opinion Mr. Justice Fish reviewed various cases, including the Carlisle case in 78/320 (2 S. E. 751), and the 74/734 (58 Am. R. 463). The decision in the case of Harper, 70/119, was approved, and certain later decisions, which were not in harmony with it, were disapproved. * * * The rule appears to be too well settled now in this State to discuss it as an open question." Cited 132/77.

In Bishop, 132/71, it was held that, where in an action for damages for a personal injury the presiding judge erroneously gave to the jury an instruction which authorized them to add to their verdict and include in it interest at the rate of seven per cent. from

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the date of the injury, and where the evidence clearly shows the date of the injury and the date of the verdict, so that any possible amount allowed as interest which may have been added to the verdict in pursuance of the erroneous instruction could be accurately calculated and definitely determined, the discretion of the trial judge in allowing any possible interest which may have been included in the verdict to be written off from it and the judgment, and thereupon refusing to grant a new trial upon the ground of such erroneous charge, will not be disturbed. In this case the judge undertook to correct the possible effect of an erroneous charge by giving instructions in the manner above referred to, but on account of an error in calculation the amount so allowed to be written off was insufficient, by a small amount, to cover the possible amount which may have been included in the verdict as interest. Upon review, after ascertaining from the record the greatest possible amount which may have been included in the verdict as interest, this court will affirm the judgment of the trial court in refusing a new trial on the ground of the erroneous charge referred to, with direction, however, that, within thirty days from the filing of the remittitur from this court in the court below, the plaintiff write off from the verdict and judgment the amount specified in the opinion in this case, which should have been written off as representing any possible interest which may have been included in the verdict; but upon a failure so to write off, the judgment to be reversed. The dissent of Atkinson, J., in this case did not extend to the foregoing head notes. Lumpkin, J., said: "Where damages are of a character in the fixing of the amount of which the discretion of the jury is involved, as in cases of general damages, or damages for pain and suffering, or the like, the determination of the amount is peculiarly for the jury. If the finding is so excessive as to justify the inference of gross mistake or undue bias, the proper mode of correction on the part of the presiding judge is to grant a new trial. Code, § 4399 (3803). He can not substitute his discretion or finding of a proper amount for that of the jury, and grant a new trial unless the plaintiff will write down the verdict to an amount with which he is satisfied or which he would have found had he been a jury. If bias or prejudice on the part of the jury infected their finding, decreasing the amount would not wholly eradicate the infection. The same bias or prejudice which prompted the finding of an excessive verdict may have had its effect in producing the finding in

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favor of the plaintiff at all. Therefore in such cases the presiding judge should grant a new trial unconditionally, and not refuse it on condition that some of the verdict be written off, or require the plaintiff to write off a portion of it, and thereupon on that basis refuse a new trial. In cases of the character above indicated there is no exact measure by which the excessive portion of the verdict can be segregated from that which is proper, and written off from it. But there is another class of cases where this can be done, and where there is no necessity for the granting of a new trial in order to correct a finding for an erroneous amount which can be accurately measured and deducted from the verdict."

719. Verdicts that were not excessive.

In *Leathers*, 92/93, the injuries were internal and severe—likely to be permanent, and totally disable the plaintiff, a farmer, from doing work. The verdict was for \$3,000.

In *Southern Bell Tel. & Tel. Co. v. Jordan*, 87/69, the verdict was for \$2,000. The injuries were serious.

In *Hyde*, 87/721, the verdict was for \$2,433.35 and not being so excessive as to shock the moral sense, was sustained. Plaintiff was forcibly ejected from a train and injured.

In *Fleetwood*, 90/23, the verdict was for \$4,375. The plaintiff, who was a passenger, was assaulted and abused by the conductor of the train.

In *Clowdis*, 90/358, a wife sued for the homicide of her husband, and she recovered a verdict for \$4,000.

In *Brantley*, 93/259, a widow sued for the homicide of her husband, who was a yard-hand. The verdict was for \$8,000.

In *Rigdon*, 85/867, the plaintiff a train-hand, lost a middle finger in coupling cars. The verdict was for \$550.

In *Weaver*, 85/869, plaintiff's arm was mashed. The verdict was for \$750.

In *Mayor v. Caldwell*, 81/76, plaintiff was injured by the falling of an awning. The injury was a grave one and the verdict was for \$800 to \$900.

In *Slater*, 92/391, the plaintiff was struck on the foot by a stick of wood thrown from a passing engine. The verdict was for \$1,500.

In *Ryles*, 84/420, the plaintiff was a car-coupler. His thumb and finger were crushed and were amputated. The verdict was for \$5,000. It was held that "though the verdict is not altogether satis-

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prove very serious, whilst the pain and terror already suffered are, in themselves, no small matter. At first we were rather dubious whether the verdict for the father could be so well defended; but on further consideration, we think it may. The loss of his horse, the injury to the wagon, the loss of his son's service while laid up, and the expense of taking care of him and of the horse, are not all of his injury. If the doctor is right, the son may at any time, be again prostrate from the effect of his injury, and new loss and new expense come to the father." 50/91.

Plaintiff being fifty-five years old, and previously strong and able to do all kinds of work, and earn \$8.00 or \$10.00 per month, but since able to do only such work as cooking, and having been confined to her bed for several weeks in consequence of the accident, and having suffered great pain, which still continues, a verdict for \$500 is not excessive. Smith, 81/620.

In Keating, 99/308, the plaintiff was a farmer forty years of age, and he made about \$500 a year. His left foot was cut off by the wheels of a car. He recovered a verdict for \$9,000.

In Smith, 84/698, there was a verdict for \$7,500. A new trial was granted. On the second trial a verdict was rendered for \$7,500, and a second new trial was granted. It was held that where, according to the weight of the evidence, there is grave doubt whether the plaintiff ought to recover anything, the court below is warranted in granting a new trial, even a second new trial, if the damages found by the jury are extreme or excessive. The case was tried again, 86/229, and resulted in a verdict for \$7,000. A new trial was denied and it was held that, the controversy being one of fact only, a third verdict for the plaintiff, not being excessive in amount, and the evidence, taking it in its utmost force, letter, and spirit, in favor of plaintiff, being sufficient to warrant a recovery, a fourth trial should be denied. In dealing with a third verdict, the law is satisfied with the evidence if, upon the most favorable view that can be taken of it in behalf of the prevailing party, and counting as naught all conflict, the jury could have reached the conclusion at which they arrived.

In Elliott, 85/183, a flagman who lost a thumb in uncoupling cars recovered \$500.

In Bowers, 86/22, an engineer received a verdict for \$2,266.66. His injuries were grave and permanent.

In Ocean S. S. Co. v. Matthews, 86/418, the verdict was for

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\$1,000. The plaintiff sustained permanent and painful injuries from a falling bale of cotton while in the lower hold of a ship.

Where plaintiff, a man of twenty-three years of age, was greatly wounded and bruised, suffering great pain for a long time, and being compelled to have his right hand amputated above the wrist, a verdict of \$4,700 was not only not excessive, but was quite moderate. DeBray, 71/406.

Plaintiff, eleven years of age, a passenger on defendant's train, was thrown by the backing of an engine against the train so violently across one of the seats that he shortly after had pains in his left side and breast, and for months suffered intensely therefrom. It was claimed that the injury was permanent, and rendered plaintiff incapable of severe exertion, and decreased his capacity for labor from one-half to two-thirds; that he had previously been bright and strong, but since he had been dull and weakly. Defendant's evidence showed that the engine was backed against the train by an employee without authority; the plaintiff's father said, shortly after the accident, that the plaintiff had merely got a good shaking. A physician testified that a month before the accident he had treated plaintiff; found that he then had a difficulty in breathing and swelling in the left side; that plaintiff looked very delicate; that shortly after the accident plaintiff was worse, but in witness's opinion this was but a continuation of the old trouble, as there was then no evidence of physical injury except from the disease. Other physicians testified that plaintiff's trouble was probably from disease, and not from the accident. Held, that a verdict for plaintiff was warranted, and in such case, a verdict for \$5,000 is not excessive. Childress, 86/85.

In Dooley, 86/295, it appeared that the plaintiff, when injured, was in his thirty-third year; he was stout and healthy and was receiving wages of seventy dollars per month. He was thrown out of the caboose to the ground, whereby his heart was displaced, his shoulder dislocated, so that he lost the use of his arm and it was wasting away, his jawbone was broken, five of his teeth knocked out, and he could not close his teeth properly to masticate his food, his head, side and thigh were cut, and his leg and hand skinned. The heart displacement impairs its action and prevents proper circulation of the blood, rendering it dangerous for him to engage in manual labor requiring exertion or in occupations which he followed before the injury. His weight decreased thirty-five pounds. The heart trou-

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ble had increased. He could not earn more than \$20.00 per month. At the first trial he recovered \$15,000; at the second the jury found for him \$16,044.

In Richards, 62/306, the plaintiff, who was a railroad engineer, was injured for life, ruined for capacity to work at his trade, suffered much pain, body and mind, and was but thirty-five years old. The verdict was for \$3,500.

In Kicklighter, 63/708, the plaintiff was seriously injured, perhaps permanently, about the breast and spine, besides minor injuries, without fault on her part. She was twenty-six years of age. The verdict was for \$2,500.

In Johnson, 66/259, Crawford, J., said: "This court is not permitted to substitute its estimate for that of the jury. We appreciate the extreme difficulty which must attend honest and upright jurors in determining with accuracy and fairness the real damages sustained in these cases; their sound sense and deliberate judgment, based upon all the testimony, must finally determine how much should be allowed as compensation for the injury suffered. They are to be aided in their delicate and responsible duty by the judge, who should caution and counsel them against excessive findings. In this case the judge warned the jury to take care to be reasonable and just, and not oppressive. They have said how much the damages were, and our law has declared that 'the question of damages being one for the jury, the court should not interfere unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias.' "

A verdict of \$5,500 in favor of a widow who sued for the homicide of her husband was not excessive where it appeared that the husband had an expectancy of over twenty years of life and an annual income of about \$1,000, deductions having been made on account of contributory negligence, the effect of advancing age, and the support of the husband himself. Pittman, 73/325.

Where plaintiff receives in his side, just above the hip, a gaping wound two inches long and three or four inches deep, which causes him great suffering for six years, and physicians say that the injury is permanent, and his health destroyed, considering his age and probable duration of life, a verdict for \$9,000 does not show bias or prejudice on the part of the jury. Lewis, 84/211.

In Moore, 83/453, a boy nine years of age fell or was thrown by another boy off the front platform of the car and the car ran

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over both his legs. According to his testimony he stayed in bed a number of weeks and suffered most excruciating pain, his legs being terribly mashed and broken; has recovered his health, but his legs are badly bent and twisted, and permanently deformed. Probably the muscles and bones will never be as strong as they otherwise would have been. He lost a year from school. He still suffers, and is likely to suffer, some pain from the injury, especially in damp weather. His capacity for earning money was reduced one-fourth, according to the estimate of one of his witnesses. The testimony for defendant tended to show that from the effect of the injury there was a shortening of the right leg from about a quarter to a half inch, and the left leg was considerably bowed outward, and was somewhat larger than the right leg; that a large scar had been left on the right thigh; that plaintiff seemed to walk remarkably well, limped some, but that could be avoided by an extra sole on his shoe, perhaps one thickness of leather, which would not interfere with his walk; that, considering his age and the compensating power of nature, he would be practically almost as strong as anybody, and his capacity to earn a living not be materially lessened; and that the deformity would always exist, and, so far as lifting and getting about was concerned, he would not be as strong as before, though the strength of the bones was not impaired. It was held that, though it is apparent that the plaintiff contributed to the injury, this court can not be certain, on the facts in evidence, that the damages were excessive, the injury being immeasurable by a court as to pain and suffering, and the damages found being \$5,000.

In Boston, 83/387, the plaintiff was injured when in the act of alighting from a street-car. She fell with her left arm under one of the wheels of the car where it was badly mashed. The shock and injury caused a miscarriage. Before she was hurt she washed and ironed for a living, averaging \$35 a month, after paying expenses. She was hurt on the 28th day of November, 1866, and did not get able to work again until March, 1887, and then went into service at \$12.00 a month, but could not do the work, and her wages were reduced to \$8.00 or \$10.00 a month. Her physician testified that he examined her the night she was hurt; found the skin torn off the arm, the flesh and muscles of the arm mashed and bruised, and the bone of the upper arm scraped as if between two flat surfaces. The wound was a complicated one, and did not heal. She suffered great pain, and had hysterical attacks. The tissue around

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the bone was destroyed, and it caused the bone to decay partially, and to emit an offensive odor. Partial death of the bone ensued, abscesses formed, and had to be opened with a knife several times, and the nerves of the arm were injured, which weakened the grasp of the little finger and the finger next to it. He testified that the injury would more or less affect the use of the arm for life; that he could not state what proportion of the capacity to work she had lost. The verdict was for \$1,240.

In an action against a railroad company for personal injuries, a verdict of \$2,000 in plaintiff's favor will not be set aside as excessive where it appears that, before the accident, plaintiff, whose business was farming, was a strong man, nearly twenty-four years old; that he could then make about \$300 per year; that by the accident his arm was broken in two places—one a common fracture, the other compound; that he suffered and still suffers in the arm, breast, back, and kidneys; that he had not been able to do any work for six months thereafter; and that his capacity to work had been permanently reduced fifty or seventy-five per cent. *Chandler, 84/37.*

In *Waldhaur, 84/706*, the plaintiff, a boy seven years of age, was drawing his velocipede over the defendant's track, at or near a street-crossing, and was run over by a street-car pulled by two mules. He recovered a verdict of \$4,500; it was set aside and he recovered on the second trial \$2,500.

In *Williams, 88/16*, a verdict for \$2,350 in favor of a car-coupler, who lost one finger, another was broken and it and another was mashed.

In *City of Atlanta v. Martin, 88/21*, the verdict was for \$1,000. Plaintiff was a dressmaker and was injured by a defective sidewalk.

In *Varnadore, 94/639*, the plaintiff sued the railway company for damages from an alleged illegal ejection from its car of him while a passenger on its train, and after payment of fare by him. His petition alleged and his testimony showed that he was ejected forcibly by defendant's conductor, and the most abusive language was used to him by the conductor, and that after being ejected he was forced to walk about ten miles to a station, where he obtained transportation to Savannah, his original destination. Plaintiff at the time was about nineteen years old. For the defendant, the evidence was to the effect that he did not pay his fare, and was ejected for this reason; that the conductor stopped the train and put him off at a flag-station; and that no abuse of any kind was used towards him,

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nor indignity put upon him. The verdict was for \$800. It was held that though the amount of the verdict is large, it is not so large as to justify the imputation of bias or prejudice; and, the presiding judge having approved the finding, this court while not fully concurring has no legal power to interfere.

In Thomas, 68/744, the plaintiff claimed damages for injuries sustained by him by reason of a violent, unnecessary and improper blowing of the whistle of an engine by the engineer, thereby causing his horse to run away and injure him. He recovered a verdict for \$1,000. The company moved for a new trial, and it was granted. On a subsequent trial a verdict was rendered for \$5,000, and a new trial was refused. Thomas, 73/350.

In Singleton, 70/464, it was alleged that by the negligence of the company's agents in putting the plaintiff off the train, the plaintiff's leg was broken and he suffered other injuries. He recovered a verdict for \$6,000, and it was held that while the damages given might be high, they were not so excessive as to warrant the inference of partiality, prejudice or corruption, on the part of the jury, or to require a reversal of the judgment of the court below.

In Williams, 74/723, the plaintiff was fifty-two years of age; his services were worth \$1.25 per day. Both legs were crushed, and one had to be amputated, and there were injuries to his back and shoulder. The verdict was for \$6,040.

In Allison, 86/145, a verdict was rendered for \$11,250. It was set aside for error on the trial. On a second trial a verdict was recovered for \$12,000. Allison was a postal clerk. He was twenty-one years of age, and was earning \$1,150 a year. There was concussion of the spine, disorder of the bowels and urinary organs, partial paralysis, shrinking of one leg about one inch, twenty pounds loss of weight, weakness of nerves, eyesight, and hearing, permanent and almost total inability to labor, much pain and suffering.

In Wiggins, 91/208, the plaintiff was a postal clerk receiving a salary of \$1,000 a year. His age does not appear from the report of the case. His injuries were severe and permanent, totally disabling him from work. The verdict was for \$14,375.

Johnston, 89/560, was for the homicide of the plaintiff's minor son. The son was eighteen years old, was making \$3.00 a day driving a wagon. His average earnings were about \$1.25 or \$1.50 per day. The verdict was for \$5,000.

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Howard, 91/99, was a car-inspector. He lost three fingers and the verdict was for \$2,416.50.

In a suit for damages resulting from the negligent conduct of the agents of a railroad in failing to stop its cars at the depot of a place where, by a passenger's ticket, she had a right to depart from the train, but stopping at another point and causing the passenger to alight in the rain, whereby she was injured, a verdict for \$100 was reasonable. *Wilkenson*, 77/75.

In *McClusky*, 45/288, the plaintiff, who was a passenger, was carried beyond his station and the train was slackened to let him get off. Under the direction of the conductor he did get off and in doing so, injured his ankle. The jury rendered a verdict for \$500.

An action was brought for assaulting, beating and wounding the plaintiff, and a verdict obtained for \$750. It was said that if the jury believed the testimony they were authorized to find against the defendants and it could hardly be said that they might not find as much as they did. The wound was a terrible one. *Humphreys v. Hendricks*, 28/157.

In *Little v. Carmicheal*, 32/406, the verdict was for \$400. *Lumpkin, J.*, said it ought to have been doubled, as a more bold and aggravated case of the indulgence of angry passions, of lawless violence, on the person of a peaceable and unoffending man had never been before the court.

In *Gavan v. Ellsworth*, 45/283, the verdict was for \$3,092.50. By the blow that was inflicted on Ellsworth, he was disabled from being an engineer, and a physician testified that he believed that the inner table of the skull was broken, and was pressing on the brain.

In *Flander v. Meath*, 27/358, a little girl threw herself in the way of a dray. She was injured and was wholly at fault. The jury gave her a verdict for \$50. The plaintiff moved for a new trial on the ground of inadequate damages. The judge thought that if the jury found for the plaintiff, they were bound to find a larger sum. The defendant acquiesced in the verdict. The new trial was granted and the Supreme Court reversed the case, stating that when a person voluntarily throws herself in the way of a dray, and an injury ensues, the jury may find almost nominal damages, notwithstanding they should be of the opinion that the driver of the dray was slightly more in fault than the party hurt. Notwithstanding the jury may think the person injured altogether in fault, yet, if from pity, or any other consideration, they should return a verdict for damages, and the de-

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fendant acquiesce in it, the plaintiff can not complain, and demand a new trial. Thus intimating that had the defendant sought to set aside the verdict it would have been done. Brinson, 70/234.

In Davis, 127/89, the plaintiff, a boy ten years of age, was roughly handled by an employee of the railroad company who assisted him from the train. His knee was injured and there was some evidence that pain or inconvenience resulting from the injury might continue for some time. A verdict for \$1,200 was held to be not excessive.

In *Augusta v. Tharpe*, 113/152, a boy twelve years old was seriously hurt by a barbed wire. He suffered much pain. The verdict was for \$300.

In Barnes, 113/212, the verdict was for \$10,000. He was a court stenographer and was earning \$3,000 per annum. He was thrown from the platform of a car and was seriously injured.

In Hyer, 113/776, a widow sued for the death of her husband an engineer and recovered a verdict for \$5,500.

In Grady, 113/1045, a fireman recovered a verdict for \$7,000. The character and extent of his injuries are not shown.

In Wood, 114/144, the verdict was for \$450. Plaintiff was expelled from a train at night.

In Phillips, 117/99, there was a verdict for \$7,000. Plaintiff was a switch engineer and the injury occurred in Florida. His leg was amputated.

In Grogan, 117/461, there was a verdict for \$750 for injuries sustained in alighting from a street car.

In Herron, 119/389, a boy twelve years old lost a leg. The verdict was for \$5,000.

In Douglas, 119/658, a woman recovered a verdict for \$5,500 for injury sustained by jumping from a train.

In Cooper, 120/24, the plaintiff, an employee, was twenty years of age, he was earning between twelve and fifteen dollars, besides commission, a week. One of his legs was shortened and he suffered great pain. The verdict was for \$5,000.

In Miller, 120/453, the plaintiff was a railway clerk. He was earning \$1,400 a year. The verdict was for \$4,000 for pain and lost time.

In Lasseter, 122/680, the verdict was for \$5,000. He was an employee, was sixteen years of age. He lost an eye and suffered great pain.

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In Streyer, 123/279, the verdict was for \$1,000. The injury was caused by a collision between a wagon and a street car.

In Friedman *v.* Goodman, 124/532, the verdict was for \$400 for bites of a dog.

In Bell, 124/663, the plaintiff sued for the death of her thirty-four year old daughter. The verdict was for \$6,141.96.

In Wright, 6 G. A. 172, the verdict was for \$3,500. An employee of defendant jerked the plaintiff from a train and injured her, causing retroversion of the womb.

In Harper, 124/836, the verdict was for \$15,000. Plaintiff was an "order clerk." He was 33 years old and was earning \$65 per month, and the injury made of him a permanent physical wreck.

In Reynolds, 126/658, the verdict was for \$7,500. The plaintiff was ten years old and a train ran over one of his feet.

In Davis, 127/89, the verdict was for \$1,200. Plaintiff was ten years of age and was injured in alighting from a car. He suffered pain and his knee was injured.

In Parker, 127/472, the verdict was for \$7,500. Plaintiff was 14 years of age, both legs were amputated and he suffered great pain. His earning capacity was \$1 per day with prospect of an increase.

In Forehand, 128/547, the verdict was for \$15,000. He was 38 years of age and earned from \$1,200 to \$17,000 per annum. One leg was amputated.

In Mote, 131/166, the plaintiff, a fireman, recovered a verdict for \$10,000. He was forty-one years old, and earned \$2 per day and sustained serious injury.

In Maddox, 131/799, the plaintiff was a car repairer. The verdict was for \$5,000 for injuries to the spine.

In Ransom, 5 G. A. 740, a woman recovered a verdict for \$700 on account of insulting language of a conductor.

In Brock, 132/858, the plaintiff was 18 years of age. He was run over by an engine, his arm was broken and both legs had to be amputated below the knees. The verdict was for \$20,000.

In Wallis, 133/553, there was a verdict for \$250, for a failure to stop a train at a station.

In Ingram, 135/696, the verdict was for \$10,000. Plaintiff, an employee, had his leg broken, he was a cripple for life, and suffered pain. The case was four times before the Supreme Court and the litigation lasted for fifteen years.

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In Minor, 6 G. A. 804, the plaintiff sued for the death of her husband. He was an employee, he was 26 years old, and he earned \$60 per month besides \$12 to \$15 perquisite. The verdict was for \$10,715.

In Miller, 5 G. A. 402, the verdict was for \$25,000. Both of his legs were cut off. He was twenty-one years of age, was a locomotive fireman, and was earning \$1.75 per day. He experienced great pain and suffering.

In Decker, 5 G. A. 21, the plaintiff sued for the homicide of her husband, which occurred in Alabama. The verdict was for \$12,000. The age, earning capacity, etc., of the husband are not stated.

720. Excessive verdicts.

In Sears, 53/631, a verdict for \$10,000 was held to be excessive and unsupported by the evidence. It was an action by a widow to recover damages for the death of her husband. The report of the case does not show what the testimony was.

Where the damage alleged was the breaking of the plaintiff's leg, resulting in permanent injury, he being twenty-one years of age, realizing from \$200 to \$300 for four months, and being deprived thereafter of employment, a verdict for \$14,833 was excessive. Singleton, 66/252.

In Brauss, 70/368, the plaintiff and his wife were wrongfully ejected from a street-car and put off in the mud in the presence of a number of people, and the verdict was for "the amount of his attorney's fees and costs of court and fifty dollars as damages." It was illegal as to the attorney's fees and not excessive as to the damages.

In Strickland, 90/562, the plaintiff recovered a verdict for \$1,500. He was ejected from the train because he did not have a ticket and would not pay the regular charge for his passage. He claimed to have used due diligence in the effort to procure a ticket, and that it was the fault of the company that he had not succeeded. He had to walk three or four miles to reach his destination. It was held that the verdict was so excessive as to suggest bias or prejudice on the part of the jury. Cited, 98/684.

In Elliott, 58/454, the plaintiff was traveling on a free ticket which had on it an endorsement in the form of a contract to be signed by the passenger by which the bearer of the ticket assumed

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risk of accidents, etc. When he presented the ticket to the conductor, the latter asked him to sign the endorsement, telling him that the regulations of the company required it. The passenger refused to sign and also refused to pay his fare. The conductor ejected him. He brought suit and recovered a verdict for \$5,000. A motion for a new trial on the ground that the verdict was excessive, and other grounds, was made and the verdict was set aside.

In Lyon, 89/16, the plaintiff had a ticket to Brooks Station. The conductor did not ask her destination, nor did she tell him, and no one came to take up her ticket. The train passed Brooks without stopping, it being a flag-station at which trains did not stop unless signaled to do so for the purpose of receiving passengers, or when there were passengers on board bound for such station. The train stopped at Lake Creek, a mile and a half beyond Brooks. The conductor told her in a loud voice, and in the presence of other people, to get off. She got off and walked up the railroad to Brooks. She lived in the country and was in the habit of walking a good deal. The day was pleasant, and she found her way back to the station easily. A verdict was rendered for \$2,000, and it was held to be grossly excessive. Cited, 89/554; 95/243.

In Foley, 98/678, the plaintiff's ticket was rejected and he was required to leave the train. He was on his way from Atlanta to Savannah. At the station where he was put off he found a train on its way to Atlanta, and he returned on it. He recovered a verdict for \$1,300. Simmons, C. J., said: "This was grossly excessive. There were no aggravating circumstances. His person was not touched, and there was no insulting language or other improper demonstration on the part of the conductor or any other employee of the defendants. The conductor simply informed him that the ticket was bad, and that he would have to pay his fare, or be put off, and, upon his declining to pay, insisted that he should get off at the next station, which he did. As already stated, upon his leaving the train he met another on its way to Atlanta, and returned on it; and on the next night he resumed his journey to Savannah. There was no evidence as to the pecuniary loss outside of the amount paid for his fare. It is manifest, therefore, that the amount of the recovery is out of all reasonable proportion to the extent of the injury."

In Jett, 95/236, the plaintiff, a girl of fifteen years, was a passenger on an accommodation-train to Ketts Station. The train was

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not stopped at that station to let her off, and she went on to Stone Mountain with some friends. The next morning she went on that train to her home at Jetts Station. A verdict was rendered for \$750. It was held that the verdict in this case being out of all reason and conscientious proportion to the injury, and so large in amount as to give reason to suspect bias or prejudice on the part of the jury, the ends of justice require a new trial. Lumpkin, J., said: "We grant a new trial in this case because we think the verdict was too large, and out of all just and reasonable proportion to the injury done to the plaintiff. We can not help feeling that the amount is so great as to give reason to suspect bias or prejudice on the part of the jury. An examination of the evidence will show that no physical pain was inflicted upon the plaintiff, no indignity offered her, and that she endured no mental suffering or anxiety. The actual inconvenience to which she was subjected was very slight indeed, and yet the relatively large sum of \$750 was awarded to her. The evidence as to the alleged 'aggravating circumstances' was, in our opinion, very weak indeed. It seems there had been some slight grudge between the conductor and the father of the young lady, but it is not, in our opinion, in the least degree probable that the former was at all influenced by it. The evidence of the conductor is not entirely clear and satisfactory. It would, perhaps, not be unfair or unjust to say that he evidenced stupidity, both as to his conduct in the transaction under investigation and as to the account of it given by him on the stand. We do not think, however, this constitutes any good reason for inflicting such a penalty upon the railroad company as the jury have seen proper to impose. It is with great reluctance that we ever interfere with the verdicts of juries on the ground that they are excessive, but this is one of the cases in which we feel constrained to do so. In this connection, see *Eskew*, 86/641, where a verdict of the same amount, under circumstances probably more strongly justifying its rendition, was set aside by this court. It was not, it is true, distinctly ruled that the damages were excessive, but Chief Justice Bleckley expressed the view of the entire court when he said: 'We are strongly inclined to the opinion that the amount is out of reasonable and conscientious proportion with the magnitude of the injury.'" Cited, 98/684.

When the negligence of the defendant, if there was any at all, seems to have been but slight, and that of the plaintiff appears to

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have been greater, a verdict in favor of the plaintiff for \$10,000 is not only flagrantly extravagant, but so excessive as to disclose either bias in his favor or prejudice against the defendant, or that the jury wholly mistook and misapprehended the instruction given to them by the court, and a new trial is required. *Smith, 76/209.*

Two verdicts, finding heavy damages for the alleged injury having been rendered, the second for more than twice as much as the first, the wide difference between them in amount may, in the light of the whole case, justify the judicial mind in suspecting bias or prejudice, and the presiding judge having ordered a new trial because the second finding was excessive, and this court not being thoroughly convinced that there was error in so doing, affirms the judgment, with the qualification and direction that the plaintiff's right to recover stand and remain established, and that the new trial be had upon the question of amount only. *Powell, 77/192. Cited, 3 G. A. 638.*

In *Goins, 59/426*, it appeared that the plaintiff, a girl of seventeen years of age, held an excursion ticket which entitled her to pass over the road from Columbus to Opelika and return. It was part of the contract that the holder might come back on any regular train the next day, but this did not appear on the ticket. The agent who made the contract failed to report it. The plaintiff got aboard the regular morning train the next day, and the conductor who had no notice of all the terms of the contract, refused to pass her on the ticket and demanded the usual fare to Columbus. He had orders not to recognize the ticket. He was polite. The plaintiff had no money; she was on the excursion with some friends and without any special protector. She walked about one mile to the house of a friend and remained there until time to take the night train. The agent who had made the contract, reported its terms, and, on the next train, the ticket was recognized and she returned to Columbus. She was delayed twelve or thirteen hours, and the train on which she returned left Opelika at 11 o'clock at night and arrived at Columbus at 1:30 A. M. The pecuniary value of her time was \$1.30 a day. She recovered a verdict for \$1,000. The court granted a new trial on the sole ground that the damages were excessive. In the opinion of the Supreme Court they were grossly excessive, and it was not only the right, but the duty, of the presiding judge to order a new trial. The suit was founded on a breach of contract, and actual damages only could be recovered;

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or if none, then nominal damages. Goins, 68/190. Another young lady of the same party, in the same excursion, and treated in the same way, recovered fifty dollars, and it was held to be enough. Hughes, 61/131.

In Humphries, 108/591, the plaintiff was carried beyond the station to which she had taken passage. She recovered \$500 and it was held to be excessive.

In Baldoni, 115/1013, Simmons, C. J., said: Baldoni, a peddler of balloons and confetti, bought a ticket over the Georgia railroad from Macon to Augusta. He did not take the train on the day the ticket was purchased, but two days thereafter started on his journey. When, a few miles from Macon, Baldoni presented his ticket to the conductor, the latter informed him that the time within which the ticket could be used had expired, that the rules of the company limited the use of the ticket to the day on which it was purchased, and that therefore he could not ride upon it. Baldoni had no notice of this rule of the company, and there was no limitation expressed on the ticket. Baldoni insisted that he had paid his money and was entitled to ride. After some further conversation, the conductor informed him that they were approaching the first station outside of Macon, and that he must get off of the train. When the station was reached Baldoni objected to leaving the train, but obeyed the orders of the conductor and alighted. The conductor seems to have called the agent at the station and told him of putting Baldoni off and requested him to flag the incoming train so that Baldoni could return to Macon. This Baldoni denied, claiming that he had to alight hurriedly in the darkness and find his way to the agent. At any rate, the incoming train was stopped, and Baldoni, paying a few cents for his fare, returned to Macon. He reached Macon before ten o'clock in the evening, having been absent therefrom but two or three hours. Baldoni then attempted at several different boarding-houses to get lodging for the night, but was refused. He did not go to a hotel, because he was not sufficiently well dressed, and was afraid the rates would be too high. He finally slept in the city park on some straw. He became quite cold during the night, and early in the morning warmed himself in the station of another railroad company. The ejection from the train was on Saturday night. Baldoni remained in Macon all day Sunday, purchased another ticket from the Georgia Railroad Company, and, just twenty-four hours after his first attempt to make the trip, boarded

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a train for Augusta, which place he reached on Monday morning. He thus lost one day, Sunday, on account of the action of the conductor. At times Baldoni's business netted him as much as \$100 per day, and at other times nothing. Augusta was not at that time a good place for his business. He brought suit against the company for damages, and the jury awarded him \$1,250. Simmons, C. J., said: "While it is true that the conductor of the train had no legal right to eject the plaintiff because of the expiration of the time limit put upon his ticket by rules of the company of which the plaintiff had no notice, the evidence of three witnesses for the defendant showed that there was no force used, but that the plaintiff obeyed the order of the conductor and alighted at the station. The plaintiff himself testified that the conductor took hold of him and got the best of him, and he surrendered, but even then it does not appear that he was in any way injured or hurt physically. He did not lose any time from the sale of his goods by reason of the delay, the day lost being Sunday. He slept in the park in Macon because, according to his testimony, the boarding-house keepers refused to entertain him and he was not sufficiently well dressed to go to a hotel. According to his testimony there was but one other passenger in the coach from which he was ejected. Under these facts, we think the verdict for \$1,250 was so excessive as to show bias and prejudice in the minds of the jury. While railroad companies should be held to strict accountability for a violation of the rights of their passengers, we think that juries should not be allowed to run wild in the assessment of damages in cases like the present."

In Ransom, 8 G. A. 277, a woman sued on account of the language and manner of a conductor and it was held that, under the evidence in this case, a verdict for \$1,000 damages is manifestly out of all proportion to the injury proved, and is so excessive as to demand the inference that the jurors were influenced by undue bias, partiality, or prejudice.

In Dorsey, 113/564, the verdict was for \$1,000. Plaintiff was carried beyond his destination.

In Wood, 118/172, a passenger was carried past her station and she had a verdict for \$249.50. She missed her dinner.

721. Conclusiveness of verdicts.

Where the law is fairly and fully given in charge, the verdict of

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the jury on the subject of negligence, contributory negligence, the degree of each, and the apportionment of damages, or the withholding any, is conclusive, if approved by the presiding judge, provided there be evidence enough to support the finding. *Howe*, 74/426.

Where, in a suit for personal injuries against a railroad company, the damages were laid at \$20,000, and the evidence was sufficient to authorize a verdict of \$10,000, and the jury returned a verdict: "We, jury, find for the plaintiff the sum of ten thousand (10,000.00) and cost of suit," such verdict, where nothing otherwise appears, will be construed to be a verdict for \$10,000, and the judgment entered thereon for ten thousand dollars should not be set aside on the ground that it was not authorized by the verdict. *Mote*, 131/166.

In a suit by a passenger against a railroad company to recover damages for personal injuries, a verdict was rendered for the plaintiff, in the sum of \$4,300. There was conflict in the evidence as to the plaintiff's contributory negligence. On his motion for a new trial, held, that any error of law relating to the defendant's liability was rendered harmless by the verdict, unless it was such as might have influenced the jury to reduce the amount that the plaintiff was entitled to recover. There was no error of law in the admission of evidence or in the charge of the court which could have affected injuriously or materially the amount of the damages that the plaintiff was entitled to recover. The amount of the verdict was exclusively a question for the determination of the jury, under all the evidence. *O'Quinn*, 7 G. A. 309.

Whether the killing of the plaintiff's mule was an unavoidable accident, or was due to culpable negligence of the defendant in the running of its cars, was a question of fact; and the verdict of the jury, finding against the company on this issue, will not be disturbed by this court, there being some evidence to support the finding. Especially is this true where two juries have found against the defendant, and their verdicts have been approved by the trial judge. *Waycross Electric Light & Power Co.*, 1 G. A. 488.

722. When verdict for defendant should not be directed.

When there was evidence warranting the finding that the plaintiff proved his case as laid, directing a verdict for the defendant was erroneous. *Phillips*, 112/197. Cited, 114/494; 116/230.

The evidence being of such a character as to have authorized a

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finding for either party, the case should have been submitted to a jury under proper instructions, and it was error to direct a verdict. *Cunningham*, 118/276.

The facts in this case were sufficient to carry to the jury the question of negligence chargeable to the defendant, which it is alleged resulted in the injury to the plaintiff. The evidence concerning the plaintiff's conduct at the time of the injury was not such as to authorize the court as a matter of law to hold that his negligence or want of care would defeat a recovery. It was, therefore, erroneous for the court to direct a verdict for the defendant. *Talley*, 126/56.

There is conflict in the evidence, and fair and reasonable inference therefrom of liability, and the court should not have directed a verdict for the defendant. *Dabbs*, 8 G. A. 350.

In an action against a railway company for negligently communicating fire through sparks from a passing engine to adjacent property, the defendant admitted that the fire was communicated by the engine named, but offered proof that the engine was equipped with a first-class standard spark-arrester; also the testimony of the engineer that at the time in question it was being operated in the usual and ordinary manner, and that no more sparks were emitted than were necessary in the running of the train; the plaintiff submitted proof that this same engine also communicated two other fires, to adjacent property, on the same day, and that as it passed the plaintiff's premises it was "puffing and blowing" more than usual: Held, that while the plaintiff's case was very weak, nevertheless, under the testimony, the facts proved and inferences to be drawn therefrom were not so entirely free from issue as to justify the court in directing a verdict for the defendant. *Wheeler*, 4 G. A. 439.

In *Wallace*, 116/230, *Lumpkin*, P. J., said: "The action of the court in directing a verdict for the defendant can be sustained only upon the theory that, viewing the testimony and all legitimate inferences therefrom most favorably for the plaintiff, she was not entitled to recover. As a reviewing court we must treat as established in her behalf every contention of fact insisted upon by her which the jury would have been warranted in sustaining. There was ample evidence to show negligence on the part of the defendant, and the real issue in controversy was whether or not the deceased was guilty of contributory negligence. If he was, his widow has no right of action. If he was not, she has."

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The plaintiff having failed to prove his case as laid, the court should have awarded a nonsuit. The defendant having introduced no testimony, the direction of a verdict in its favor was erroneous. *Proctor & Gamble Co. v. Blakely Oil Co.*, 128/606, 57 S. E. 879. The judgment is reversed, with direction that in the trial court a judgment of nonsuit be substituted for the judgment rendered. *Caudell v. Southern Railway Co.*, 2 G. A. 479. Cited, 7 G. A. 180.

It was held in *Snowball*, 130/83, that where the evidence affords an inference that a person was killed on a public-road crossing by the running of a railroad locomotive, and the attendant circumstances are not conclusive that the homicide was attributable to the negligence of the deceased person, or could not have been prevented by the exercise of reasonable care and diligence by the agents of the railroad company in charge of the locomotive, the court should submit the questions of negligence and diligence to the jury. *Evans*, P. J., said: "The evidence tended strongly to support the verdict directed by the court, but did not demand it. Where the question is one of diligence or negligence, and a particular conclusion is sought to be established from a given state of facts, the jury are the alchemists to make the test, and announce the result." Citing *Mozeley* and *Pitts* cases, *supra*.

In *Findley*, 7 G. A. 180, it was held that where the plaintiff fails to prove his case as laid, the case should terminate by non-suit, and not by direction of verdict for the defendant. There was no substantial variance between the pleading and the proof in the present case. There was no conclusive evidence of contributory negligence on the plaintiff's part. The court erred in directing a verdict for the defendant. *Powell*, J., said: "The direction of a verdict is not the proper disposition of the case where there is a variance between the petition and the proof; there should be a nonsuit. *Proctor & Gamble Co. v. Blakely Oil Co.*, 128/606 (57 S. E. 879); *Caudell*, 2 G. A. 479 (55 S. E. 689); *Murphy*, 4 G. A. 522 (61 S. E. 1133); *Gay v. Peak*, 5 G. A. 584 (63 S. E. 650)."

In *Randolph*, 134/352, it was held that the court erred in directing a verdict for the defendant. *Evans*, P. J., said: "The jury, and not the court, is the tribunal to settle the ultimate facts of diligence and negligence sought to be established by deductions from data concerning the truth of which the respective parties to the litigation are at issue."

Section 5926 (5331) of the Code, authorizing the court to direct

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the jury to find a verdict for the party entitled thereto, where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, demands a particular verdict, is not repugnant to the constitution of this State, as impairing the right of trial by jury. Price, 124/899.

While a trial judge may, within the restrictions prescribed by Code, § 5926 (5331) direct a verdict, this court will in no case reverse a trial court for refusing to do so. Mote, 131/166.

In Blich, 122/711, the court directed a verdict for the defendant, and it was held that where, by a written contract, a railroad company gave to the other party to the contract the right to maintain a warehouse on its right of way, the tenant agreeing on his part to "save and hold harmless the company, its successors and assigns, from all damage, injury, or liability that may arise from the destruction or injury of any building, improvement, or personal property of any description, by fire, or from any other cause whatever, whether the same should be attributable to the negligence of the employees of said company or not, where such damage, injury, or liability is caused or increased by reason of the use of the premises hereunder," the company was not liable to the tenant for the destruction of the warehouse by fire presumably communicated from one of its trains, it being neither alleged nor proved that the communication of the fire to the warehouse was caused by the gross negligence of the company.

Statute of limitations.

CHAPTER 38.

STATUTE OF LIMITATIONS.

723. When right of action accrues.

724. Action for personal injuries, when barred.

725. An amendment relates back.

726. When *lex fori* prevails as to tort committed in another State.

727. When the action is on contract, four years bars.

728. Where the defense was not made in the trial court.

723. When right of action accrues.

In *Peterson*, 97/798, it was held that an action brought on the 24th of October, 1893, for injuries to the person alleged to have been sustained on October 24, 1891, was barred by the statute of limitations. Lumpkin, J., said: "A right of action 'accrues' as soon as the party is entitled to apply to the proper tribunal. It can scarcely be doubted that the plaintiff in this case might properly have filed his declaration against the defendant on the very day he received the injuries of which he complained. As he had the right to sue on the day he was injured, the computation of time against him should begin on that day."

The right which the statute, Code, §§ 4424, 4425 (3828, 3829), gives to the widow to recover for the homicide of her husband when his death results from a crime or from criminal or other negligence, can not exist until he is actually dead, and the statute of limitations begins to run from the date of his death, and not from the time at which the injury was inflicted which caused the death. The common-law presumption in prosecutions for murder, appeals of death, and inquisitions against deodands, that an injury was not the proximate cause of the death when the death did not occur within a year and a day after the injury was inflicted, does not apply to the right of action given by this statute. *Bass*, 104/390. Cited, 107/43; 111/588.

The widow's right of action is not barred if it is filed within two years from the death of the husband, notwithstanding it appears on the face of the petition that it was filed more than two years from the date of the injury. And *Cobb*, J., said: "It is not necessary in the present case to determine when such an action would be barred, as in no event is there any statute that could be applicable to such a case which would raise a bar within a period of less than two years. *Glover*, 107/43; 111/579, 588. Cited, 125/470.

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As the loss of service is the damage to the father and is the gist of the action, the right of the father to the service which he has lost is to be determined by the laws applicable in the relation of master and servant. The master has a property right in the services of his servant. It enures to him and his estate in the same manner as any other interest in property, and the law limiting the term in which actions to recover for injuries to personalty may be brought limits the right of action in such a case. *Frazier*, 101/70. Cited, 7 G. A. 280.

"Where a parent, entitled to bring an action of tort for the homicide of a son, dies without having instituted suit, the right of action does not survive to the administrator of such parent." Section 4421 (3825) of the Code, to prevent abatement of actions *ex delicto* in certain cases where either of the parties may die *pendente lite*, applies only to suits actually pending at the death of the party. The general rule that a day in law is an indivisible point and that fractions thereof will not be regarded in the computation of time is not applicable where the exact time is necessary to the existence of a right, and can not be invoked to prevent an abatement of a suit *ex delicto* filed in the name of a plaintiff, who, at the exact time of filing, had been dead for three hours. The actual facts, and not the legal fiction, in such case must prevail. *Peebles*, Adm'r, 7 G. A. 279.

724. Action for personal injuries, when barred.

An action for personal injuries against a railroad company is barred after the lapse of two years from the time the right of action accrued; and where the person injured, in consideration of a contract by the company to do certain things for his benefit, and to give him employment for life, agreed not to bring suit, and refrained from so doing for nearly eight years, his right of action is not relieved from the bar of the statute, although the company, in making the contract with him, did so for the purpose of deterring him from bringing his action within the time prescribed by law; it appearing also that the company had complied fully with all its undertakings other than that of giving the plaintiff employment for life, and had in fact employed him for more than seven years before he was discharged. If the plaintiff had any right of action at all against the company, it was for a breach of the contract by which his original cause of action against it was compromised and settled. *Kent*, 92/782.

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Where a declaration filed in due time failed, for the want of vitally essential allegations, to set forth a cause of action, but such allegations were afterwards, by leave of the court, supplied by amendment, and at a subsequent term an order was passed striking the amendment, whereupon the plaintiff dismissed her action, and afterwards, within six months, brought another action, which substantially set forth the same cause of action contained in the original declaration as amended, this second action was a renewal of the first, and was not barred by the statute of limitations, although filed more than two years after the cause of action accrued. *Smith*, 93/742.

Where the plaintiff had a right of action at common law, the statute of limitations in Georgia is the ordinary statute which applies to actions for tort. *Krogg*, 77/202.

Where the statute of Alabama gave the right to sue within one year from the death, the action must be brought within the year. *Lacy*, 49/106.

An action by a wife to recover damages for the negligent homicide of her husband is an action for an "injury done to the person," and must be brought within two years after the date of the death of the husband. *Cobb, J.*, said: "We think it is clear that in an action by a wife for the homicide of her husband, the gist of the action is an injury to the person. A wife has no property rights in the services of her husband, and no property rights in his life. Her statutory right to recover for his homicide is a substitution of the wife in his place for the purpose of recovering for the injury inflicted upon him, and the measure of damages is the value of the husband's life to the man himself, not the value of his life to the wife." *M'Dilda*, 125/468.

725. Amendment relates back.

When a declaration is amended, the amendment relates back to the date of the filing of the original declaration, and if it be not barred by the statute of limitations the amendment will not be barred. *Nix*, 68/572. Cited, 101/847.

The general rule is, that an amendment to a petition relates back to the time of the filing of the original petition, which is the only date to be considered, relatively to the pleadings, on the question as to whether an action is barred by the statute of limitations. *Horrine*, 121/386. Cited, 123/30; 4 G. A. 530.

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Where a suit is dismissed by the trial court, and a valid writ of error is sued out for the purpose of procuring a reversal of the judgment of dismissal, the statutory period of six months within which a suit which has been dismissed may be renewed, so as to prevent the cause of action from being barred by the statute of limitations, does not run while such writ of error is pending. *Randolph*, 126/238.

726. When the *lex fori* prevails as to torts committed in another State.

In *O'Shields*, 83/621, it was held that where a right of action for a tort is given by the statute of another State, and no period of limitation is prescribed otherwise than by the general law of limitation prevailing in that State, the *lex fori*, not the *lex loci*, applies on the subject of limitation. *Bleckley*, C. J., said: "Where torts are committed in foreign countries, or beyond the territorial jurisdiction of the sovereignty in which the action is brought, the *lex fori* governs, no matter whether the legal right of action depends upon the common law or a local statute, unless the statute which creates or confers the right limits the duration of such right to a prescribed time. When that is the case, after the bar attached in the local jurisdiction the right would be extinct as well as the remedy." Cited, 1 G. A. 168, 5 G. A. 30.

727. When the action is upon contract, four years bars.

Where the action against a common carrier is upon the contract to safely carry, although the breach alleged resulted in injuries to the person, for which damages are sought to be recovered, the action is one *ex contractu*, and is not barred until four years after the breach, notwithstanding the statute applicable to actions *ex delicto* bars actions for injuries to the person unless the suit be brought within two years after the right of action accrues. *Simmons*, J., said: "*Patterson* brought his action against the *Augusta and Savannah Railroad Company*, alleging that he had made a contract with it, whereby it agreed for a certain consideration to transport him safely from the city of *Augusta* to the city of *Waynesboro*, on the line of its railroad, and that there was a breach of the contract, in that it did not transport him safely, but that he was injured and damaged by the loss of his arm. Where a person makes a contract of this

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kind with a common carrier, and he is injured by the negligence of the carrier, he has two remedies—one an action for the breach of contract, the other an action on the case for the wrong—and he may elect which remedy he will pursue. If he elects to bring an action for the breach of contract, he has, under the Code, four years within which to bring it; if he elects to sue upon the tort, he has two years. If he sues upon the breach of contract, and there is a final adjudication of this suit upon the merits, he can not afterwards sue the same defendant on the tort. The plaintiff in this case having brought his action for a breach of the contract, and four years not having elapsed before the filing of the suit, he was in time; and, if he proves the contract alleged with this particular defendant, or one of its agents, who was authorized to make it, and the alleged breach and injury resulting therefrom, we see no reason why he can not recover. See Code, § 4407 (3811). Hutch. Carr, § 790." Patterson, 94/140.

728. Where defense not made in trial court.

A mere failure to prove the time when such tort was committed will not be cause for setting aside, on certiorari, a judgment in the plaintiff's favor, on the general ground that the same is contrary to the evidence, there being no plea of the statute of limitations, and it not appearing that this defense was in any manner made or insisted upon in the trial court. Wells, 103/209.

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